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JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 319

ESTATE OF RICHARD C. DUPONT, Deceased,
WILMINGTON TRUST COMPANY, Executor,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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WILMINGTON TRUST COMPANY, Executor,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Estate of Richard C. DuPont, Deceased, Wilmington Trust Company, Executor, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case on May 16, 1956.

Opinions Below

The findings of fact and opinion of the Tax Court (App. 3a) are reported in 18 T. C. 1134. The opinion of the Court of Appeals (App. 27a) is reported in 233 F. 2d 210.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254(1). The judgment of the Court of Appeals was entered May 16, 1956.

Questions Presented

Was decedent in active service as a member of the military forces of the United States, within the meaning of Section 939 of the Internal Revenue Code of 1939, when, during World War II he was killed parachuting from a glider while on an ordered military mission, where his duties in the Air Forces were of a military nature which normally only commissioned officers are ordered to perform, he not being commissioned and for military reasons having all outward indicia of a civilian employee?

Statutes and Regulations Involved

Section 939(a) of the Internal Revenue Code of 1939 and pertinent Treasury Regulations thereunder are printed at pages 24a-26a of the Appendix of petitioner.

Statement of Case

Decedent was a famed expert in glider activities. In World War II the development and use of gliders for military invasion and combat was an urgent and vital part of the Air Forces program. General Arnold, the Commanding General of the Army Air Forces, appointed decedent, then only 31 years of age, as his Special Assistant and a member of the Air Staff with "the authority of an Assistant Chief

of Air Staff" to have charge of the Air Forces Glider Program. He was ordered to report directly to General Arnold. His duties were to plan and supervise the glider program; determine tactics, techniques and tactical proficiency requirements for use of gliders; determine policies, programs, standards and doctrines for training individuals and units; direct and coordinate testing of gliders; and in other ways to expedite the glider program.

Under orders from General Arnold decedent made various trips to military air stations and camps for glider surveys, maneuvers and tests. He worked in the field with Major General Ridgeway and airborne troops in devising training techniques and tactics for anticipated use of gliders in combat. In July, 1943, at the request of the Theater Commander he was ordered to the North African Theater of Operations during the campaign in Sicily. While there he personally observed the use of gliders in combat operations during the Sicilian Campaign. Subsequently he was posthumously awarded the Distinguished Service Medal for contributing materially to the successful accomplishment of a mission of the greatest importance in the war effort.

In appointing him as Special Assistant in charge of the Glider Program, General Arnold designated that he "serve in a civilian capacity". General Arnold would testify that by such words he meant that in civilian clothes du Pont could deal direct with the General and was thus relieved of channelling his activities through numerous subordinate military offices, and since time was crucially of the essence, his being in civilian clothes was "truly a military expedient". Thus, he was not commissioned as an

officer but to enable him to expedite the duties ordered by General Arnold he was given all the outward indicia of a civilian. He filed the Civil Service Commission form and took the oath of office of a government employee, the administrative assistant to the Secretary of War in a form designated his position as a Special Consultant, his appointment was for 90 days and extended, and his pay was $25 a day.

Decedent died on September 10, 1943, on "a military mission under direct orders from Headquarters" when, at March Field in California, his parachute opened too late after he had to bail out of a falling experimental glider, piloted by an Army Colonel, in which decedent was riding as an observer of its military characteristics.

General Arnold would testify that

> "Factually he was as much a member of our military establishment as though he held a commission. He gave his life in military service as actually as any officer in uniform in actual military combat."

The Tax Court held that Section 939 was an exemption statute to be strictly limited, and relying on the use of the word "soldier" in an extemporaneous statement made in a Congressional debate, held the statute embraced "only persons formally members of the armed forces." The Court of Appeals, looking only at the outward civilian indicia clothing decedent's position, affirmed.

Reasons for Granting the Writ

1. The decision of the Court below conflicts with the principle clearly established in *Commissioner* v. *Connelly*, 338 U. S. 258 (1949). That case held that the test of whether one is deemed in military service for purposes of the particular statute, is determined, not by his formal military or non-military status, but by whether his functions are of a military character. Section 939, here involved, without doubt was a tax relief or remedial measure entitled to liberal construction, enacted to remove the estate tax on those who died while performing hazardous military functions in line of their duties while actively serving as a member of the armed forces. The hazardous military dangers incident to military duties is key to the meaning of this statute. When Congress meant to limit the words "a member of the armed forces" to formally commissioned officers or enlisted men it used the words "commissioned officer" and "enlisted personnel" in Section 22(b)(13) of the Internal Revenue Code of 1939, whereas in order to carry out the alleviating purpose of Section 939 it used the broad words "citizen or resident".

In the *Connelly* case this Court held that the compensation received by a commissioned officer of the Coast Guard Reserve (by statute defined as part of the naval forces) was not "for active service as a commissioned officer in the military or naval forces" where the functions he performed as such an officer were the same civil service duties he performed as a lawyer in the Geodetic Survey before he was commissioned and in all other respects as to pay, leave, etc. he retained his former civilian status. The Court held,

in essence, that the statute was intended to exempt only pay received for performing military functions.

The instant case presents the reverse side of the coin. Here the functions decedent was called upon to perform were strictly of a military nature of the type which only an Air Force General can or is ordered to perform. Decedent was given the authority of an Assistant Chief of Air Staff, all of whom were generals. As the Court in the *Connelly* case laid aside the military status of taxpayer and looked at his civilian functions to carry out the Congressional purpose of Section 22(a)(13), so should the civilian indicia of decedent, assumed by him as a military expedient so he could under direct orders from General Arnold more quickly perform his military duties, be disregarded. His clear military functions bring him within Section 939.

In *Mitchell* v. *Cohen,* 333 U. S. 411 (1948), the question was whether the term "ex-servicemen" under the Veterans Preference Act included a person who served in the Coast Guard Reserve but whose functions were such as did not disrupt his regular civilian job or his home life. The Court adopted the military function test, and properly decided that his former military status should be disregarded where his military functions did not alter his regular civilian job.

In the instant case, the court below erroneously tested decedent's rights under Section 939 by his outward appearance of a civilian rather than, as Congress necessarily intended in such statute, by the hazardous military functions he was ordered to perform in line of his military duties and service in the Air Forces. Such disregard of the principles which this Court has so clearly established

renders the decision of the Court below in conflict with the *Connelly* and *Mitchell* cases and warrants this Court's review.

2. The Supreme Court has granted a petition for a writ of certiorari in *Jose Soriano* v. *United States,* No. 760. The fundamental question there presented is whether Filipino guerilla units engaged in military operations during the Japanese occupation of the Phillipines were in "the service of the armed forces of the United States" by reason of the call into such service of all the organized military forces of the Phillipine Government. The guerilla forces performed actual military operations and functions for our armed forces in the South Pacific after the surrender at Bataan and Corregidor of the formally inducted United States and Phillipine military forces.

Again this Court has before it the question of whether the formalistic or the realistic test should govern. Since the instant case presents a problem similar in principle and in application, it is appropriate that the writ sought be granted in this case.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

GEORGE S. LEISURE,
CARBERRY O'SHEA,
Attorneys for Petitioner.

Of Counsel:
DONOVAN LEISURE NEWTON & IRVINE

No. 319

AUG 14 1956
JOHN T. FEY, Clerk

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 11,800

ESTATE OF RICHARD C. DU PONT, DECEASED,
WILMINGTON TRUST COMPANY, EXECUTOR,
Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

ON PETITION TO REVIEW A DECISION OF THE TAX COURT OF THE UNITED STATES.

Argued April 19, 1956

Before GOODRICH, KALODNER and HASTIE, *Circuit Judges.*

OPINION OF THE COURT

(Filed May 16, 1956)

By GOODRICH, *Circuit Judge*

The present appeal is from a decision by the Tax Court of the United States deciding in favor of the Commissioner on two points raised by counsel for the taxpayer. 18 T.C. 1134 (1952). One of the questions is the valuation of certain life insurance policies owned by the decedent, Richard C. DuPont, on the life of his father. The other question involves an exemption from an additional estate tax imposed by section 935 of the Internal Revenue Code of 1939

(26 U.S.C.A. § 935) found in section 939 of the Internal Revenue Code. 26 U.S.C.A. § 939 (Supp. 1955). The last point will be considered first.

The exemption just mentioned reads as follows:

> "The tax imposed by section 935 shall not apply to the transfer of the net estate of a citizen . . . dying . . . while in active service as a member of the military or naval forces of the United States . . ."

The words to which we must give attention are the last ones in the quotation. Was Mr. Richard DuPont, at the time he met death in a glider accident, "a member of the military or naval forces of the United States?"

The decedent in his lifetime had acquired fame as an expert in glider activities. His experience and knowledge in this field resulted in his appointment as a member of the staff of General H. H. Arnold, Commanding General of the Army Air Forces. He was appointed a Special Assistant to the Commanding General "in charge of the Army's glider program for air transport of Army troops and cargo by gliders . . ." This quotation is taken from the findings of fact which in turn were largely composed of a stipulation between the parties which was adopted by the court. If living the General would have testified "Factually, he was as much a member of our military establishment as though he held a commission. He gave his life in military service as actually as any officer in uniform, in actual military combat." The reference to the giving of his life was to the fact that Mr. DuPont had been killed in a glider accident while in the performance of his duties as special consultant.

There is no doubt that Mr. DuPont gave his life in the service of his country. Nevertheless, we think it clear that he did not come within the exception to section 935 already referred to. The reasons are to be found in the facts stipulated between the parties. Mr. DuPont filed a Civil Serv-

ice Commission form. He was appointed as "Special Consultant." His appointment was for a brief period, ninety days at the start. There was a special arrangement about his pay. It was to be $25.00 for each day he worked. His travel applications and orders were issued from the civilian personnel division of the Office of Chief of Air Staff. It is quite clear to us that the Tax Court was correct in finding that the decedent was employed by the United States in a civilian capacity because that was a more convenient form of employment for him to have to accomplish the things which his expert knowledge would help him accomplish for the air force.

The undefinitive legislative history of this exemption paragraph is set out in the Tax Court's opinion and will not be repeated here.[1] Compare also for a comparable though not similar situation, *Commissioner v. Connelly*, 338 U.S. 258 (1949); likewise, for a case where the taxpayer had many more of the indicia of military service than we have in the present case, *United States v. Popham*, 198 F.2d 660 (8th Cir. 1952).

The second question is more difficult. The decedent owned, at the time of his death, some insurance policies upon the life of his father who was then living. He also owned an interest in a trust of other life insurance policies upon the life of his father. But the questions here involved will be settled if we consider only the first group.

It is conceded that the passing of these policies from the living to his successors is subject to tax "To the extent of the interest therein of the decedent at the time of his death . . ." under section 811(a) of the Internal Revenue Code of 1939, 26 U.S.C.A. § 811(a). The dispute here concerns a criterion to determine the extent of the decedent's interest at the time of his death, in other words, valuation. The Commissioner contends that the value is replacement

1 See 18 T.C. 1134, 1142 (1952). That the legislators were thinking in terms of "servicemen" finds additional support in a committee report which accompanied the bill extending the exemption to victims of the Korean conflict. S. Rep. No. 781, 82d Cong., 1st Sess. VIII, B, 1 (1951).

cost, that is, what it would cost to go out and get, on the effective date, this policy from the same or other insurance company. If such policies could not be purchased, then the value is to be set at interpolated terminal reserve. This is the reserve value which the company keeps on its books against its liability on the contracts plus the adjustment of the reserve to the specific date in question. *Commissioner v. Edwards*, 135 F. 2d 574, 576 (7th Cir. 1943). The petitioner says the policy should be included in the gross estate "at the present value of the face amounts of the policies but at not less than their cash surrender values."[2]

We have no direct authority in point. The petitioner has cited us some discussions by writers and a decision or two which we think too far away from the point at issue to be worth carrying into citation.

If the question were one with regard to an inter vivos gift of an insurance policy the law is well settled, by now, that the rule contended for by the Commissioner in this case is to be followed. *Guggenheim v. Rasquin*, 312 U.S. 254 (1941); *Powers v. Commissioner*, 312 U.S. 259 (1941); *United States v. Ryerson*, 312 U.S. 260 (1941); *Houston v. Commissioner*, 124 F.2d 518 (3d Cir. 1941); *Phipps v. Commissioner*, 43 BTA 790 (1941); *Lockhart v. Commissioner*, 46 BTA 426 (1942).

The taxpayer argues that we should not apply this rule to the case of an estate tax. It is contended that no one would make a gift of a life insurance policy unless the understanding with the donee was that he wanted the life insurance protection and would keep the policy. Where this information as to mental state of donors and donees comes from we do not know. Then the argument continues that the only value which an insurance policy on the life of another person has to the executor is its cash surrender value. The executor, it is argued, may not properly keep

2 If the terms of this claim seem ambiguous, the language is the petitioners, not ours. It is doubtless used in an effort to tie up the solution of the question with an earlier regulation hereafter discussed.

this insurance policy on the life of another in the estate because it does not produce enough income.

We do not go along with this argument by the petitioner. He cites us no authority that the executor must immediately cash in life insurance policies which the decedent owned on the life of another. Nor can we accept his argument that in all cases the value would not be anything more than the right to get the money at the cash surrender value. If the named insured were advanced in years and in precarious health, it might well be that the actual value, as a practical matter, is far more than the cash surrender value which the company by its charts and tables would be willing to pay on the policy on a given date.

But, as we remarked in *Mearkle's Estate v. Commissioner*, 129 F.2d 386, 388 (1942), these matters lie in the field of speculation or at best discussion. As pointed out by the Supreme Court in the *Guggenheim* case, *supra*, a life insurance policy is not a simple contract to pay money but a complex kind of a chose in action. The right to keep it to collect money at a future date may be worth more than the right to get today that part of the policy which, under the company's contract, is called its cash surrender value.

There is some advantage in having rules applicable to estate tax go along parallel with those applicable to gift tax since one is if not altogether complementary at least related to the other.[3] This does not mean that this parallelism must follow in every case. In a case where the rule is set in gift tax as it is in this situation, it is not unreasonable for the administrative arm of the government to adopt that rule for the similar problem in estate tax. This it has done by a 1952 amendment to the regulations which by its terms is to be given retroactive effect.[4]

The taxpayer argues that the amendment to the regulation changes the rule theretofore established also by regulation and cannot be applied retroactively to a situation

3 Harris v. Commissioner, 340 U.S. 106, 107 (1950).
4 T.D. 5906, 1952-1 Cum. Bull. 155, para. 1.

which arose before the current amendment was promulgated.

If the earlier regulation did in fact cover the type of problem presented by this case, the argument would require very thoughtful consideration. But we disagree with taxpayer's contention on the effect of the regulation. In our view the original regulation did not offer a solution to the problem here. Taxpayer cites a section which at first blush appears applicable because of general language about "future payments."[5] Yet the catch line heading this provision, "Annuities, life, remainder, and reversionary interests", indicates a much more limited scope, which we do not think properly expanded to cover an ordinary insurance policy on the life of another. And taxpayer himself puts in question the appropriateness of the regulation when he adds his own gloss to the method prescribed. "Present value" becomes "present value but not less than cash surrender value."

When under the Code of 1939 the regulation was drawn which governs the valuation of a gift of insurance on the life of another, the proper method had been made clear by court decisions and the established approach was reflected in the regulation.[6] At the time the regulation which taxpayer now cites was drafted there was no case law indicating the appropriate treatment for the comparable estate tax situation. With such a state of affairs we think it more reasonable to conclude that a regulation making no specific reference to insurance on the life of another was not designed to offer a definitive solution to a unique and complicated problem of valuation.

As we pointed out in a similar situation in the *Mearkle* case, cited above, here is a situation where it may well be that more than one method of valuation could be established as reasonable. A good case could be made, perhaps, for saying that what passed on from the dead to his executor

5 U.S. Treas. Reg. 105, § 81.10(*i*)(3) (1942).
6 U.S. Treas. Reg. 108, § 86.19(*i*) (1943).

was what the executor could get for this policy by turning it into money. As already said, however, that omits certain elements in the life insurance contract which may well change the rule when we decide upon its "value" at a particular time. When more than one rule is possible and the Commissioner has laid down one in complete accordance with the rule for gift taxation and which is not in itself unreasonable, we cannot say that the determination is so arbitrary as to be unlawful.

The decision of the Tax Court will be affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

No. 319

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IN THE

United States Court of Appeals

For the Third Circuit

No. 11800

ESTATE OF RICHARD C. DuPONT, DECEASED,
WILMINGTON TRUST COMPANY, EXECUTOR,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON PETITION TO REVIEW THE DECISION OF THE TAX COURT OF THE UNITED STATES

APPENDIX OF PETITIONER

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PETITIONER'S APPENDIX

Relevant Docket Entries

Tax Court Docket No. 17,261

		Record Document Number
1948		
Feb.	12—Petition received and filed. Taxpayer notified. Fee paid	2
March	9—Answer filed by General Counsel	5
1950		
May	11—Motion for leave to file attached amendment to petition granted, amendment filed	10
June	16—Answer to amendment to Petition filed by General Counsel. 6/19/50—Copy served	13
1951		
Oct.	1—Hearing had before Judge Van Fossan on the merits. Stipulation of facts filed. Petitioner's brief due 11/15/51; General Counsel's brief due 12/31/51. Petitioner's reply 1/15/52	24
"	8—Motion for leave to file amendment to petition granted, amendment filed	26
"	25—Transcript of Hearing 10/1/51 filed	27
Dec.	6—Answer to amendments to petition filed by General Counsel. 12/10/51—Copy served	30
"	20—Brief filed by taxpayer. (P) Copy served 12/31/51	32

Relevant Docket Entries

		Record Document Number
1952		
Feb.	20—Motion for leave to file the attached brief. Brief lodged, filed by General Counsel. 2/21/52—Granted	35
Mar.	28—Reply brief filed by taxpayer. 3/31/52—Copy served	38
Sept.	26—Findings of Fact and Opinion rendered. Judge Van Fossan. Decision will be entered under Rule 50. Copy served	39
1955		
June	27—Agreed computation filed	40
"	28—Decision entered, Judge Van Fossan, Div. 9	41
Sept.	29—Petition for review by U. S. Court of Appeals for the Third Circuit filed by taxpayer	42
"	29—Proof of Service filed	43

Findings of Fact and Opinion of Tax Court

18 T. C. No. 142

THE TAX COURT OF THE UNITED STATES

ESTATE OF RICHARD C. DU PONT, DECEASED, WILMINGTON TRUST COMPANY, EXECUTOR, Petitioner, v. COMMISSIONER OF INTERNAL REVENUE, Respondent.

Docket No. 17261 Promulgated September 26, 1952.

1. On the date of his death, Richard C. du Pont owned five single premium life insurance policies which he had taken out on his father's life. Decedent also owned a one-fifth undivided interest in a trust, the sole assets of which consisted of 17 life insurance policies on the life of his father. The father survived the decedent. *Held*: For estate tax purposes, the proper measure of value of such policies, to the extent of decedent's interest therein at the date of his death, is the replacement cost thereof or, in the absence of such replacement cost, the respective interpolated terminal reserve values thereof.

2. In 1943, petitioner's decedent was appointed special assistant in charge of the Army's glider program on the staff of General H. H. Arnold, then Commanding General of the United States Army Air Forces. Decedent was appointed and served in a civilian capacity. While on an experimental test flight of a glider in September, 1943, decedent was forced to bail out and was killed when his parachute failed to fill. Respondent denied petitioner the benefits of section 939, I.R.C. *Held*: Section 939, *supra*, was enacted as an exemption from the additional estate tax and was meant to apply only to estates of those technically and formally in the military or naval forces of the United States who met their death incident to or as a result

of service therein. *Held, further,* the decedent not having at any time been a commissioned officer, warrant officer or member of the enlisted personnel of the military or naval forces, the provisions of section 939 are inapplicable to his estate.

Carbery O'Shea, Esq., for the petitioner.
Francis X. Gallagher, Esq., for the respondent.

The petitioner here seeks redetermination of an estate tax deficiency in the amount of $545,610.98, and claims overpayment of such tax in an unstated amount. Several issues raised in the original petition filed have been disposed of by stipulation of the parties. The issues thus settled will be reflected in a Rule 50 recomputation. There remain in controversy two questions for our consideration and decision. Such questions are:

1. Whether a life insurance policy owned by a decedent on the life of another person who survived such decedent, should be valued in the decedent's gross estate at its cash surrender value or at its replacement cost, or, in the absence thereof, at its interpolated reserve value.

2. Whether petitioner's decedent met his death while in active service as a member of the military services of the United States as a result of wounds or other injuries suffered in line of duty by reason of a hazard to which he was subjected as an incident of military service within the meaning of section 939, Internal Revenue Code.

Findings of Fact

This proceeding was submitted upon a stipulation of facts. The facts thus stipulated are so found and made a part hereof by reference.

Findings of Fact and Opinion of Tax Court

The petitioner herein is the Estate of Richard C. du Pont, Deceased. Du Pont (hereinafter sometimes referred to as the decedent) died on September 11, 1943, at the age of 32 years. He was survived by his wife and two small children. The estate tax return involved was filed by his executor, Wilmington Trust Company, with the collector of internal revenue for the district of Delaware.

At the time of his death, the decedent owned five single premium life insurance policies which he had taken out on the life of his father, A. Felix du Pont. The father survived the decedent. On the date of his death, decedent also owned a one-fifth undivided interest in a trust which the decedent's mother and her four children, including the decedent, established on December 31, 1935. The sole assets of the trust were 17 life insurance policies on the life of decedent's father, which policies the mother and children had received in 1934 by gift from the father, and which they assigned in December, 1935 to Wilmington Trust Company, trustee.

When the decedent died, the five policies owned by him, together with his one-fifth undivided interest in the 17 policies in trust, had a total face value of $604,882.67, a total cash surrender value of $378,506.43, and an interpolated terminal reserve value of $397,571.12. Immediately prior to decedent's death, insurance companies were issuing new policies similar in all substantial respects to only three of the 22 policies. The cash surrender value of these three single premium policies was less than the replacement cost thereof, which replacement cost was $159,703.50. As to the other 19 policies, five thereof had cash surrender values in excess of their interpolated reserve values. The total of the highest of cash surrender value, interpolated reserve value or replacement cost of decedent's interest in each of the 22 policies, was $419,986.18. Fourteen of the policies required annual premiums totaling $33,640.45 to keep them in force. The eight other policies required no

further premiums, three thereof having been paid up and five having been single premium policies.

On decedent's death the value of a remainder interest, computed in accordance with Regulations 105, sec. 81.10 (i), Table A, and based on life expectancy of the insured, A. Felix du Pont, in amount of the face value of each policy plus the paid-up additional insurance and dividend accumulations thereon, would be less than the cash surrender value of such policy or the interpolated reserve value thereof.

During his lifetime, the decedent had acquired fame as an expert glider pilot. He had studied aviation engineering and for some years prior to 1943 was engaged in the business of manufacturing glider aircraft. His experience and knowledge of the glider field resulted in his wartime appointment in April, 1943 as a member of the staff of General H. H. Arnold, Commanding General of the United States Army Air Forces. He was appointed as Special Assistant to the Commanding General in charge of the Army's glider program for air transport of Army troops and cargo by gliders.

By letter dated April 19, 1943, decedent informed General Arnold that the aviation corporation with which he was connected had granted him a temporary leave of absence and a complete release from other duties to enable him (decedent) to accept whatever duty the General might wish to assign him. The letter further read, in part, as follows:

* * * * *

> In order to accomplish results in a minimum of time, authority necessary to short cut usual lines seem to indicate that I would be most effective if appointed as a Special Civilian Assistant on your staff, with no military rank * * *.

* * * * *

General Arnold designated the decedent as Special Assistant to the Commanding General, Army Air Forces, "to serve in a civilian capacity". The General later explained the designation of decedent and would, if living, testify as follows:

> * * * That clause,—"to serve in a civilian capacity"—, was inserted, in his case, primarily to expedite the program for which he, because of his special qualifications, had been made responsible, and because of the urgent relation of that program to the effectiveness of United States Army Air Forces combat operations. In civilian clothes, Mr. du Pont was automatically relieved of the necessity of channeling his activities through numerous subordinate military offices: as a civilian he could deal *direct* with the Office of the Commanding General, Army Air Forces. This meant an invaluable saving of time; and time, at that period, was crucially "of the essence". In this sense, then, his being in civilian clothes was truly a military expedient. Factually, he was as much a member of our military establishment as though he held a commission. He gave his life in military service as actually as any officer in uniform, in actual military combat.

In designating the decedent as a Special Assistant, General Arnold directed the decedent to report to him through the Chief of the Air Staff. Decedent was also authorized to deal directly with the Assistant Chief of the Air Staff and with the commanding generals of the various Air Forces. A directive issued concurrently with decedent's appointment "* * * created within Headquarters, Army Air Forces, the office of Special Assistant on the Army Air Forces Glider Program". The decedent, as the Special Assistant, was given "* * * with respect to the glider program the authority of an Assistant Chief of Air Staff". His duties and functions were to:

a. Plan and supervise the glider program necessary to fulfill the mission of the Army Air Forces,

b. Determine tactics and techniques and technical and tactical proficiency requirements with respect to the use of gliders and related equipment,

c. Determine policies, programs, standards, and doctrines for training individuals and units necessary to attain the approved Army Air Forces Glider Program,

d. Determine personnel and equipment tables which relate to the Army Air Forces Glider Program,

e. Determine and approve military characteristics for material used primarily in the Army Air Forces Glider Program,

f. Determine policies, plans, and programs for the Army Air Forces Glider Program with respect to research and developmental engineering and procurement and production; determine the quantity and quality specifications and the performance aspects of proposed contracts for the procurement of gliders and related equipment; direct and coordinate the testing of gliders and related equipment; and expedite the glider procurement, production, and testing program.

To carry out and expedite the glider program to which he was assigned "* * * in a civilian capacity", the decedent did not at any time become a commissioned officer, a warrant officer, or a member of the enlisted personnel in the military service.

Prior to his official appointment, decedent completed and filed Civil Service Commission Form No. 57. He signed the oath of office of an employee of the Federal Government.

On the Notification of Personnel Action form by the Administrative Assistant to the Secretary of War, decedent's position was stated as a "Special Consultant". His appointment on such form was stated to be for 90 days and later was extended to December, 1943. His pay was to be $25 for each day he worked. As Special Assistant to the Commanding General, Army Air Forces, the decedent performed all the duties and responsibilities assigned to him. Traveling under orders, he made many trips to various military air fields, stations and camps for glider surveys, glider maneuvers, and glider tests. His travel applications and orders to cover such travel were issued from the civilian personnel division of the Office of Chief of Air Staff. He worked with Major General Ridgway and airborne troops in devising training techniques and tactics for the anticipated use of gliders in combat. Under his direction and supervision the utilization of large gliders for airborne operations was rapidly attained. From July 9 through July 27, 1943, decedent was on duty in the North African Theater of Operations during the campaign in Sicily. He went there at the request of the Theater Commander. During his duty in the Sicilian Campaign he personally observed the use of gliders in combat operations.

On September 10, 1943, the decedent went to March Field, California, on what General Arnold described in the above quoted letter as "* * * a military mission under direct orders from Headquarters Army Air Forces, Washington, D. C. * * *". On September 11, 1943, at March Field, the decedent, while acting in his capacity as Special Assistant to the Commanding General, Army Air Forces, participated as an observer in the flights testing an experimental transport glider being developed for the Army Air Forces by a private manufacturer. While the glider, piloted by an Army colonel making a familiarization flight, was being towed in flight by an Army plane piloted by an Army captain, the glider became detached from the tow

plane, stalled, and lost altitude. The decedent and other occupants were ordered by its Army pilot to leave the glider. Decedent's parachute opened but did not fill, as a result of which decedent sustained injuries resulting in his immediate death. The Army colonel, the civilian co-pilot and one of the civilian occupants of the glider were killed when it crashed.

President Franklin Delano Roosevelt awarded the Distinguished Service Medal to the decedent posthumously for exceptionally meritorious and distinguished service in displaying exceptional professional ability and inspiring leadership in planning and supervising the effective use of military gliders, directing their exploitation for airborne operations, effecting important change in training techniques, and in other ways contributing materially to the successful accomplishment of a mission of the greatest importance to the war effort.

Opinion

Van Fossan, *Judge*: This case presents two questions of first impression, the first, involving the proper valuation for estate tax purposes of the insurance policies owned by decedent or in which he had an interest in trust at his death on the life of his surviving father. The pertinent portion of the statute is section 811 (a), Internal Revenue Code.[1]

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[1] Sec. 811. Gross Estate.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

(a) Decedent's Interest.—To the extent of the interest therein of the decedent at the time of his death;

* * * * *

Findings of Fact and Opinion of Tax Court

On the date of his death, Richard C. du Pont owned five single premium life insurance policies which he had taken out on his father's life. Decedent also owned a one-fifth undivided interest in a trust, the sole assets of which consisted of 17 life insurance policies on the life of his father. The father survived the decedent.

The parties are not in dispute over the inclusion of decedent's interests in such policies within his gross taxable estate. They disagree only as to the proper method for evaluating the policies. It is respondent's position that the policies should be valued for estate tax purposes at the replacement cost of comparable contracts as at the critical date, or, in the absence of such replacement costs, at the interpolated terminal reserve values thereof, these latter values to be determined by application of the method used in gift tax cases.

Petitioner argues that the gift tax valuation method does not apply to estate tax, and that the cash surrender values of the policies represent the proper measures of value to be applied for estate tax purposes. We think respondent's position is correct.

In three opinions handed down the same day, the Supreme Court specifically rejected the cash surrender value as representing the proper measure of value of a single premium policy for gift tax purposes and adopted the replacement cost thereof as the better criterion for such purposes. *Guggenheim* v. *Rasquin*, 312 U. S. 254; *Powers* v. *Commissioner*, 312 U. S. 259; *United States* v. *Ryerson*, 312 U. S. 260. This rationale has subsequently been extended to include gifts of policies which were fully paid up. *Houston* v. *Commissioner*, 124 F. 2d 518; *Estate of James H. Lockhart*, 46 B.T.A. 426. "It is now settled that for estate tax purposes a valuation of annuity contracts based upon replacement cost at the date of death is proper and reasonable. *Estate of Judson C. Welliver*, 8 T.C. 165; *Mearkle's Estate, et al.* v. *Commissioner*, 129 Fed. 2d 386;

affirming 45 B.T.A. 894. * * *." *Estate of John L. Walker*, 8 T.C. 1107, 1111.

Petitioner apparently concedes, as it must, the force of the foregoing decisions. But it argues that they have no application to the situation before us. Several examples are set forth in petitioner's brief to prove that the cash surrender values of the policies in controversy are the only practical, realistic and reasonable criteria to use for estate tax purposes. These examples fail to impress us as being more than mere speculation. The statute involved here requires the inclusion in decedent's gross estate of the value of all property to the extent of decedent's interest therein. There can be no question that the value of decedent's interest in the controverted policies on the day he died exceeded, with few exceptions, the cash surrender values thereof, and had such policies been transferred on that date by gift rather than by death, that the replacement costs would be the proper measures of value applicable. While there might possibly be some differences in a case where, as here, the taxable transfer was by death, we see no cogent reasons, and none have been presented, why such mode of transmission should effect any marked alteration in the value of decedent's interest in the policies so transferred. We are of the opinion that cost is the better of the suggested criteria to reflect the value of the policies to the extent of decedent's interests therein at the date of his death. Petitioner has not contested the accuracy of respondent's computations of such cost values. These computations, it appears, are in accord with the rules of evaluation laid down in the above cited cases as applied to the instant situation. Therefore, as to this issue, respondent is affirmed.

There remains the issue involving the propert interpretation to be placed upon section 939, Internal Revenue

Code.[2] So far as we have been able to ascertain, this is the first time any court has had the occasion to construe and apply this section since its addition to the Code in 1949. The specific question arising here is whether the provisions of such section are applicable to the estate of the decedent, Richard C. du Pont. The pertinent facts, none of which are in dispute, follow.

The decedent was recognized and well known as an expert in glider activities. In the spring of 1943 he was appointed to be a special assistant to General H. H. Arnold, who was then Commanding General of the United States Army Air Forces. Upon his own request and recommendation, decedent was appointed to serve in a civilian capacity. The reason ascribed to the request and subsequent appointment in such capacity was to relieve decedent from the necessity incumbent upon all military personnel, of using military channels and to enable his reporting directly to General Arnold. It is well known that the military departments had many civilian expert advisers. Prior to his actual appointment, a Civil Service Commission Form No. 57 was transmitted to, completed and filed by decedent. Such form is within our judicial notice as being the standard application form for employment of civilians by the

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[2] SEC. 939. CERTAIN MEMBERS OF THE ARMED FORCES.

(a) Deaths After December 6, 1941 and Before January 1, 1947.—The tax imposed by section 935 shall not apply to the transfer of the net estate of a citizen or resident of the United States dying on or after December 7, 1941, and before January 1, 1947, while in active service as a member of the military or naval forces of the United States or of any of the other United Nations if such decedent—

(1) was killed in action; or

(2) died as a result of wounds or other injuries, or of disease, suffered while in line of duty by reason of a hazard to which he was subjected as an incident of military or naval service.

Government. Likewise, the oath of office taken and subscribed by decedent was that taken by such civilian personnel. In all other respects all action taken with regard to decedent's employment and activities was handled through civilian personnel and on standard forms prescribed for use incident to such personnel. On September 11, 1943, decedent participated as an observer in the testing of an experimental transport glider which was being developed for the Army Air Forces by a private manufacturer. The glider was piloted by a Colonel Gabel, who was at that time making a familiarization flight. While on such flight, decedent was forced to bail out and was killed when his parachute failed to fill.

It is respondent's position that the statute in question is one of exemption from tax and, therefore, requires strict construction. He argues on brief that such construction requires a person to come well within the words, as well as the reason, of the exception or proviso, and that decedent was not at any time a "member" of the military forces. On the other hand, petitioner argues for a broad construction of the term "military forces" and insists that the legislative history of the section in controversy plainly shows a congressional intent to relieve from the additional estate tax the estates of all those, whatever their technical status, who gave their lives during the war in performance of military functions, and not to limit such relief solely to those who were formally commissioned officers, warrant officers or enlisted men.

Petitioner cites numerous cases involving other legislation wherein such statutes were held to be applicable to persons who had served with or in the armed services though technically and formally not members thereof. The cases have been carefully studied and have been found inapposite to the case before us. In each instance the statute

involved was dissimilar to the one here in question and the factual situation clearly distinguishable at critical and important points.

Petitioner points to the above quoted letter from General Arnold and the language of the District Court in *Wilmington Trust Co.* v. *Mutual Life Insurance Company of New York*, 76 F. Supp. 560, as supporting its further contention that decedent should, in substance, be treated as though he were concededly as much a member of the military forces as if he actually held a commission.

Although we have the greatest respect for the author of the aforementioned letter, we cannot agree entirely with the conclusions reached by him therein. While to his military mind, decedent may have been considered factually as much a member of the military establishment as any military personnel, it does not necessarily follow that decedent may be legally so considered within the purview of section 939, *supra*.

We also feel that petitioner's reliance on the *obiter dictum* expressed in *Wilmington Trust Co.* v. *Mutual Life Insurance Company of New York*, *supra*, is misplaced. That case is one involving the same decedent wherein the court said that decedent "* * * should be treated as if he were concededly in the military service". While it be true that for insurance and certain other purposes du Pont might possibly be so treated, we do not think the same to be true in all instances—in particular, for the purposes of the tax statute in controversy. Nor do we understand the language of the District Court as meaning otherwise. If, however, it was intended to imply otherwise, then we must respectfully differ.

The section of the Code which is here under review, is clearly an exemption from tax and as such is to be strictly limited to the class of taxpayers designated. We have examined the legislative history of section 939 and have

found nothing therein to indicate a contrary interpretation. The section is unquestionably intended to embrace and be applicable only to the estates of those who were formally members of the armed forces and who died under the conditions specified. Such ambiguity as might possibly arise is resolved by the statement of the Chairman of the Senate Finance Committee relative thereto, made at the time the provisions contained in section 939 were offered and accepted as a Senate floor amendment to H. R. 5268, which bill was later enacted as Public Law 378, 81st Cong., 1st sess., or the Technical Changes Act of 1949. This statement is recorded at 95 Cong. Rec. 12997, and was, in material part, as follows:

> * * * this amendment simply gives to the *soldier* who died in action or received disability or wounds from which he died within the year or more following the actual termination of the war, or to his estate, *exemption* from the so-called additional estate tax. It is an amendment which is intended to protect the estates of such veterans against the estate tax.
>
> We gave to members of the armed services relief against income taxes; and at the time we extended to them relief against income taxes I offered an amendment, and strongly insisted that it be taken by the conferees *exempting* the estates of men killed in the service from the so-called additional estate tax. I am quite willing to take this amendment to conference. * * * [Emphasis supplied.]

In view of the foregoing unequivocal and lucid explanation, we feel that the arguments advanced by petitioner draw little support, if any, from the conference report, printed as H. R. No. 1412, the pertinent portion of which reads:

Amendment No. 12: The Senate amendment added a new section to the House bill amending subchapter B of Chapter 3 of the Internal Revenue Code to provide that the additional estate tax imposed by section 935 does not apply in the case of a citizen or resident dying between December 6, 1941, and January 1, 1947, while in military service of the United States or any of the United Nations, if the decedent was killed in action or died as the result of injuries or of disease "suffered in line of duty by reason of a hazard to which he was subjected as an incident of military or naval service." * * *

We, therefore, answer the question posed in the negative and sustain respondent as to this issue. See *United States* v. *Popham, Jr.*, — F. 2d — (C. A. 8, July 10, 1952), reversing 97 F. Supp. 63.

Reviewed by the Court.

Decision will be entered under Rule 50.

Decision of Tax Court

Pursuant to the Court's Findings of Fact and Opinion promulgated September 26, 1952, the parties herein having filed an agreed computation of tax on June 27, 1955, it is

ORDERED and DECIDED: That there is an overpayment in estate tax in the amount of $90,015.17, which amount was paid within three years before the mailing of the notice of deficiency.

(Signed) Ernest H. Van Fossan
ERNEST H. VAN FOSSAN,
Judge.

Entered Jun 28 1955

Statute and Regulations Involved

1. *Relating to Insurance Issue.*

Section 811(a), Internal Revenue Code of 1939:

"Section 811—Gross Estate The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

"(a) Decedent's Interest.—To the extent of the interest therein of the decedent at the time of his death; . . ."

Regulations 105 (Estate Tax) Section 81.10(a):

"Valuation of property.—(a) *General.*—The value of every item of property includible in the gross estate is the fair market value thereof at the time of the decedent's death or, if the executor elects in accordance with the provisions of section 81.11, it is the fair market value thereof at the date therein prescribed or such value adjusted as therein set forth. The fair market value is the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell. The fair market value of a particular kind of property includible in the gross estate is not to be determined by a forced sale price. Such value is to be determined by ascertaining as a basis the fair market value as of the applicable valuation date of each unit of the property. For example, in the case of shares of stock or bonds, such unit of property is a share or a bond. All relevant facts and elements of value as of the ap-

plicable valuation date should be considered in every case."

Section 81.10(i) (1) (2) (3) and (4) and Table A (as in force from February 23, 1942 to May 27, 1952):

"(i) *Annuities, life, remainder, and reversionary interests.*—(1) If the executor adopts the option set forth in section 81.11, any annuity, life, remainder, or reversionary interest includible in the gross estate should be valued as of the date of the decedent's death in accordance with the provisions of this section and then such value should be adjusted as explained in section 81.11 for any difference in value between the date of death and the applicable subsequent date due to causes other than mere lapse of time. If the executor does not adopt the option set forth in section 81.11, the value of any such interest should be computed as hereinafter prescribed without such further adjustment for any decrease or increase in the value of the property subsequent to the date of death.

(2) The value of an annuity contract issued by a company regularly engaged in the selling of contracts of that character is established through the sale by that company of comparable contracts.

(3) All other future payments are to be discounted upon the basis of compound interest at the rate of 4 per cent a year. If the time of payment or of payments is dependent upon the continuation of, or upon the termination of a life or of lives, the Actuaries' or Combined Experience Table of Mortality, as extended, and established actuarial principles are to be used in the computation of the present worth. For the purpose of the computation the

age of a person is to be taken as the age of that person at his nearest birthday. Table A, a part of this section, gives factors applicable to a case in which only one life is involved. (See paragraphs (4) to (8), inclusive.) Table B, a part of this section, gives factors applicable to a case in which only a term-certain is involved. (See paragraphs (9) to (11), inclusive.) If the time of payment or payments is dependent upon the continuation of, or termination of more than one life, or there is a term-certain concurrent with one or more lives, a special computation in accordance with the first two sentences of this paragraph is necessary. A case requiring a special computation may be stated to the Commissioner who will furnish the applicable factor, provided such request is made sufficiently in advance of the due date of the return. Such request must fully disclose all relevant facts. The date of birth of each person, the duration of whose life may affect the value of the interest, should be established by affidavit.

(4) If the decedent had a remainder interest in property subject to the life estate of another, the present worth of the remainder interest at the time of death should be obtained by multiplying the value of the property at the time of death by the figure in column 3 of Table A opposite the number of years nearest to the actual age of the life tenant.

Example. The decedent was entitled to receive property worth $50,000 upon the death of his elder brother, to whom the income for life had been bequeathed. The brother at the time of the decedent's death was 31 years 5 months old. By reference to Table A, it is found that the figure in column 3, opposite 31 years, is 0.31262. The present worth of

the remainder interest at the date of death is, therefore, $15,631 ($50,000 multiplied by 0.31262)."

. . .

"TABLE A

Table, single life, 4 per cent. showing the present worth of an annuity, or a life interest, and of a reversionary interest.

1	2	3
Age	Annuity, or present value of $1 due at the end of each year during the life of a person of specified age.	Reversion, or present value of $1 due at the end of the year of death of a person of specified age.
64	8.14888	.64812"

. . .

Section 81.10(i) (1) and (4), Table I and (j) (as changed by T. D. 5906, May 27, 1952, C. B. 1952-1, p. 155):

"(i) *Annuities, life estates, remainders, and reversions; estates of decedents dying after December 31, 1951.*—(1) In general.—The value of an annuity contract, or an insurance policy on the life of a person other than the decedent, issued by a company regularly engaged in the selling of contracts of that character is established through the sale by that company of comparable contracts. See section 86.19(i) of Regulations 108, relating to the gift tax. As to insurance on the life of the decedent, see section 81.288. Except with respect to the aforementioned annuity contracts and insurance policies, the values of annuities, life estates, remainders, and reversions are to be computed by the methods hereinafter prescribed in this paragraph. The present worth of such an interest which is dependent upon the continuation of, or termination of the life of one

person, or upon a term-certain is to be computed with the use of Table I or Table II of this section. If the interest to be valued is dependent upon more than one life or there is a term-certain concurrent with one or more lives see subparagraph (5) of this paragraph. For the purpose of the computation, the age of a person is to be taken as the age of that person at his nearest birthday. If the executor adopts the option set forth in section 811(j) see section 81.11."

. . .

"(4) *Remainders or reversionary interests.*—If the decedent had a remainder or a reversionary interest in property subject to the life estate of another, the present worth of such interest should be obtained by multiplying the value of the property by the figure in column 3 of Table I opposite the number of years nearest to the actual age of the life tenant. In case the remainder or reversion is to take effect at the end of a term of years Table II should be used.

Example. The decedent was entitled to receive property worth $50,000 upon the death of his elder brother, to whom the income for life had been bequeathed. The brother at the time of the decedent's death was 31 years 5 months old. By reference to Table I, it is found that the figure in column 3, opposite 31 years, is 0.28932. The present worth of the remainder interest at the date of death is, therefore, $14,466 ($50,000 multiplied by 0.28932)."

. . .

"TABLE I

(For estates of decedents dying after December 31, 1951)

Table, single life, 3½ per cent, showing the present worth of an annuity, or a life interest, and of a remainder interest.

1 Age	2 Annuity	3 Remainder
	. . .	
64	9.9036	.65337"

"(j) *Annuities, life estates, remainders, and reversions; estates of decedents dying before January 1, 1952.*—In the case of decedents dying before January 1, 1952, the general principles and methods prescribed in paragraph (i) of this section (with one exception set forth in the next paragraph) are to be followed but the present worth of the interest to be valued is to be computed with the use of Table A or Table B (which appear at the end of this section) and if neither table is applicable the computation is to be made upon the basis of the Actuaries' or Combined Experience Table of Mortality, as extended, and interest at the rate of 4 percent a year, compounded annually. . . ."

"TABLE A"

[Same as Table A to Sec. 81.10(1) as in force prior to T. D. 5906 of May 27, 1952]

Statute and Regulations Involved

2. *Military Service Issue Statute and Regulations.*

Section 939(a) Internal Revenue Code of 1939 (Chapter 3, Estate Tax, Part IV, Subchapter B, Sec. 939, as added by Sec. 10 of the Technical Changes Act of 1949, Pub. L. 378, 81st Cong.):

> "Sec. 939. *Certain Members of Armed Forces.*
>
> (a) *Deaths After December 6, 1941 And Before January 1, 1947*—The tax imposed by Section 935 shall not apply to the transfer of the net estate of a citizen or resident of the United States dying on or after December 7, 1941, and before January 1, 1947, while in active service as a member of the military or naval forces of the United States or of any of the other United Nations if such decedent—
>
> (1) was killed in action; or
>
> (2) died as a result of wounds or other injuries, or of disease, suffered while in line of duty by reason of a hazard to which he was subjected as an incident of military or naval service."

Regulation 105, Section 81.2(b) (as added by T. D. 5834, March 8, 1951 I. R. B. 1951-7, p. 6, and amended by T. D. 5941, October 24, 1952):

> Sec. 81.2. *Description of Tax.*
>
> . . .
>
> "(b) *Exemption from additional estate tax for certain members of the armed forces.* Section 939(a) of the Internal Revenue Code, as added by section 10 of Public Law 378 (81st Congress), provides that the additional estate tax does not apply to the transfer of the net estate of a citizen or resident of the United States dying after December 6, 1941, and

before January 1, 1947, while in active service as a member of the military or naval forces of the United States or of any of the other United Nations if the decedent was either (1) killed in action or (2) died as a result of wounds or other injuries, or of disease suffered while in line of duty by reason of a hazard to which he was subjected as an incident of military or naval service."

. . .

"If the official record of the military force of which the decedent was a member at the time of his death states that death resulted from wounds or injuries received or disease contracted while in line of duty, such fact shall, in the absence of evidence establishing the contrary, be presumed to be established for the purposes of the exemption. Moreover, wounds, injuries or disease suffered while in line of duty will be considered to have been caused by a hazard to which the decedent was subjected as an incident of military or naval service unless the hazard which caused such wounds, injuries or disease was clearly unrelated to such service.

A person was in active service as a member of the forces described in section 939(a) or (b) if he was at the time of his death actually serving in such forces, not necessarily in the field or in the theater of war. Personnel in the inactive reserves or on retirement are not in active service. Periods during which a person is absent from duty on account of sickness, wounds, leave, internment by the enemy, or other lawful cause are periods of active service. A member of the armed forces in active service in a combat zone who there becomes a prisoner of war or missing in action and occupies such status at death or when the wounds, disease or injury result-

ing in death were incurred, is considered for purposes of this section as serving in a combat zone.

For the purposes of this section, the term 'military or naval forces of the United States' and the term 'armed forces of the United States' each includes all regular and reserve components of the uniformed services which are subject to the jurisdiction of the Secretary of Defense, the Secretary of the Army, the Secretary of the Navy, or the Secretary of the Air Force. The terms also include the Coast Guard. The members of such forces include commissioned officers and personnel below the grade of commissioned officer in such forces.[1]

However, the exemption is not allowed to the estate of a decedent whose only military status was of a limited character, such as that of a member of the Army Specialist Corps or of certain temporary members of the Coast Guard Reserve. For the purposes of this section the term 'member of the military or naval forces . . . of any of the other United Nations' includes any decedent whose duties and status in the service of any of the United Nations other than the United States corresponded to those of any member of the military or naval forces of the United States as defined in this section."

---

[1] Prior to T. D. 5941, this paragraph read:

"For the purposes of this section the military and naval forces of the United States include (but are not necessarily limited to) the Army, the Navy, the Marine Corps, the Coast Guard, the Army Nurse Corps, Female, the Navy Nurse Corps, Female, the Women's Army Auxiliary Corps or the Women's Army Corps, the Women's Reserve branch of the Naval Reserve, the Marine Corps Women's Reserve, and the Coast Guard Reserve, including the Coast Guard Women's Reserve. . . ."

. . .

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In the United States Court of Appeals for the Third Circuit

No. 11800

ESTATE OF RICHARD C. DUPONT, DECEASED, WILMINGTON TRUST COMPANY, EXECUTOR, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT AND APPENDICES

OPINION BELOW

The findings of fact and opinion of the Tax Court (R. 3a–17a)[1] are reported at 18 T. C. 1134.

JURISDICTION

This appeal involves estate tax liability for the year 1943. (R. 3a–4a.) The decision of the Tax Court was entered on June 28, 1955. (R. 17a.) Taxpayer's petition for review was filed in the Tax Court on September 29, 1955. (R. 2a.) If the petition for review

[1] Record references herein are to the separately printed appendix to taxpayer's brief.

was timely, jurisdiction is conferred on this Court by Section 7482 of the Internal Revenue Code of 1954.[2]

[2] The Commissioner does not contend that the petition for review was untimely, but believes that the matter is not entirely free from doubt, and hence draws it to the Court's attention. It will be noted that the petition for review was filed three months and a day after the entry of the Tax Court's decision. Section 7483 of the 1954 Code requires that such petitions be filed within three months of the date of decision. On the other hand, Section 7502 of the same Code provides, so far as relevant, that any document required to be filed in the Tax Court within prescribed period shall be deemed to be delivered to the Tax Court on the date mailed. In the case at bar it appears that the petition for review was mailed to the Tax Court on September 28, 1955, the last day of the statutory three-month period. The only question, then, is whether Section 7502 applies to petitions for review. The doubt on this score arises from the fact that such petitions are filed in the Tax Court solely by reason of appellate rules, and not by requirement of the internal revenue laws, the Tax Court serving, in effect, as a mere conduit of the petition for the convenience of the appellate court.

QUESTION PRESENTED

1. Where at his death decedent owned insurance policies on the life of his father, who survived him, and had an interest in trust in other policies on the same life, how should decedent's interest in such policies be valued for the purpose of inclusion in his gross estate under Section 811 (a) of the Internal Revenue Code of 1939?

2. Where decedent was killed during the war while flying in his capacity as special civilian assistant to the Commanding General of the Army Air Forces, is his estate exempted from additional estate tax by Section 939 of the 1939 Code, which applies only to the estates of members of the military or naval forces of the United States?

STATUTE AND OTHER AUTHORITIES INVOLVED

The pertinent provisions of the statute and other authorities involved are set forth in Appendix A, *infra*.

STATEMENT

The facts material to this appeal, as found by the Tax Court (R. 4a–10a), and as revealed by Joint Exhibits A–1 and B–2 (Appendix B, *infra*), may be summarized as follows:

Decedent died on September 11, 1943. He was survived by a wife and two children, and by his father. At the time of his death, decedent owned five single-premium life insurance policies on the life of his father. He also owned an undivided one-fifth interest in a trust of which the sole assets were seventeen insurance policies on the life of his father. (R. 5a.)

The five policies owned by decedent together with the seventeen held in trust had a total face value at the time of decedent's death of $1,624,413.39, a total interpolated reserve value of $931,101.61, and a total cash surrender value of $905,120.15. (Joint Exs. A–1 and B–2.) In terms of decedent's interest in the policies (which was full ownership as to the five single-premium policies, but only a one-fifth interest as to the trust policies), the total face value was $604,882.67, the interpolated reserve value was $397,571.12, and the total cash surrender value was $378,506.43. (R. 5a.)

In the case of each of the twenty-two policies, the face value exceeded the interpolated reserve and the cash surrender values, and (where present) the replacement value. The total interpolated reserve

value of the five policies owned by decedent exceeded the total cash surrender value. So also, the total interpolated reserve value of the seventeen policies held in trust exceeded the total cash surrender value; but five of these policies had cash surrender values in excess of their interpolated reserve values. (R. 5a; Joint Exs. A–1 and B–2.)

Immediately prior to decedent's death, insurance companies were issuing new policies similar in all substantial respects to only three of the twenty-two policies, to wit, three of the single-premium policies owned by decedent. The total replacement cost of these three ($159,703.50) exceeded the interpolated reserve value ($137,495) and the cash surrender value ($133,863). (R. 5a; Joint Exs. A–1 and B–2.)

The total of the highest of cash surrender value, interpolated reserve value or replacement cost of decedent's interest in each of the twenty-two policies was $419,986.18. Fourteen of the policies required annual premiums totaling $33,640.45 to keep them in force. The eight other policies required no further premiums, three thereof having been paid up and five having been single premium policies. (R. 5a–6a.)

On decedent's death the value of a remainder interest in the amount of the face value of each policy plus the paid-up additional insurance and dividend accumulations thereon, computed in accordance with Treasury Regulations 105, Section 81.10 (i), Table A, and based on the life expectancy of the insured, decedent's father, would be less than the interpolated reserve or cash surrender value of the policy. (R. 6a.)

During his lifetime the decedent was an expert

glider pilot and a manufacturer of glider aircraft. His experience and knowledge in the glider field resulted in his appointment in April, 1943, as special assistant to the Commanding General of the Army Air Forces, in charge of the Army's program for air transport of troops and cargo by gliders. The appointment was preceded by a letter from decedent to General H. H. Arnold (then commanding the Army Air Forces) suggesting that—

> In order to accomplish results in a minimum of time, authority necessary to short cut usual lines seemed to indicate that I would be most effective if appointed as a Special Civilian Assistant on your staff, with no military rank * * *.

In appointing decedent as special assistant, General Arnold designated him "to serve in a civilian capacity;" gave decedent "* * * with respect to the glider program the authority of an Assistant Chief of Air Staff;" directed decedent to report to him through the Chief of Air Staff; and authorized him to deal directly with the Assistant Chief of Air Staff and with the commanding generals of the various Air Forces. A directive issued concurrently with decedent's appointment "* * * created within Headquarters, Army Air Forces, the office of Special Assistant on the Army Air Forces Glider Program." (R. 6a–7a.)

General Arnold later wrote with respect to decedent's appointment, and if living would testify, as follows (R. 7a):

> * * * That clause,—"to serve in a civilian capacity"—, was inserted, in his case, primarily to expedite the program for which he, because

> of his special qualifications, had been made responsible, and because of the urgent relation of that program to the effectiveness of United States Army Air Forces combat operations. In civilian clothes, Mr. duPont was automatically relieved of the necessity of channeling his activities through numerous subordinate military offices: as a civilian he could deal *direct* with the Office of the Commanding General, Army Air Forces. This meant an invaluable saving of time; and time, at that period, was crucially "of the essence". In this sense, then, his being in civilian clothes was truly a military expedient. Factually, he was as much a member of our military establishment as though he held a commission. He gave his life in military service as actually as any officer in uniform, in actual military combat.

As special assistant decedent's duties and functions were, *inter alia*, to determine tactics and techniques with respect to the use of gliders and related equipment; determine policies, programs and standards for training individuals and units; determine and approve military characteristics of materials used primarily in the glider program; determine policies, plans and programs for research, developmental engineering, procurement and production; and direct and coordinate the testing of gliders and related equipment. (R. 7a–8a.)

Decedent did not at any time become a commissioned officer, a warrant officer, or a member of the enlisted personnel in the military service. Prior to his official appointment, decedent completed and filed Civil Service Commission Form No. 57; and he signed the

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oath of office of an employee of the Federal Government. On the Notification of Personnel Action form, decedent's position was stated as that of a "Special Consultant." His travel applications and orders were issued from the civilian personnel division of the Office of Chief of Air Staff. (R. 8a–9a.)

Decedent worked with Major General Ridgway and airborne troops in devising training techniques and tactics for the anticipated use of gliders in combat. Under his direction and supervision the utilization of large gliders for airborne operations was rapidly attained. From July 9 through July 27, 1943, decedent was on duty in the North African Theater of Operations, and personally observed the use of gliders in combat operations in the Sicilian campign. (R. 9a.)

On September 10, 1943, decedent went to March Field, California, on what General Arnold described as "* * * a military mission under direct orders from Headquarters Army Air Forces, Washington, D. C. * * *". On September 11, 1943, at March Field, while acting in his capacity as special assistant, the decedent participated as an observer in flights testing an experimental transport glider. While the glider, piloted by an Army colonel making a familarization flight, was being towed in flight by an Army plane piloted by an Army captain, the glider became detached from the tow plane, stalled, and lost altitude. By order of the glider pilot, decedent bailed out. His parachute opened but did not fill, and he sustained injuries resulting in his immediate death. (R. 9a–10a.)

President Roosevelt awarded the Distinguished Service Medal posthumously to the decedent for exceptionally meritorious and distinguished service, exceptional professional ability and inspiring leadership in planning and supervising the effective use of military gliders, directing their exploitation for airborne operations, effecting important changes in training techniques, and otherwise contributing materially to the successful accomplishment of a mission of the greatest importance to the war effort. (R. 10a.)

SUMMARY OF ARGUMENT

This appeal presents two questions. One involves the proper method for valuing insurance policies held by decedent on the life of his father, who survived him, for the purpose of including decedent's interest in such policies in his gross estate under Section 811 (a) of the Internal Revenue Code of 1939. The other turns upon decedent's status relative to the military forces at the time of his death, it being contended by his executor as taxpayer herein that decedent was a member of the military forces on active duty within the meaning of Section 939 of the 1939 Code, and hence that his estate is entitled to the exemption from tax allowed by that section.

On the first question, the Tax Court held that the proper standard of valuation for the policies in question was replacement cost or, in absence thereof, interpolated terminal reserve value. Taxpayer now renews on appeal his contention that only the cash surrender value of the policies can be considered. We submit that the Tax Court's ruling is sound.

Decisions of the Supreme Court and other courts have applied the replacement cost test to insurance policies for the purposes of the gift tax; and we believe that the rationale of these cases is fully applicable to policies held by a decedent on the life of another who survives him. In both situations, the policies represent a bundle of rights and economic interests which must be valued together; no one element in this bundle, such as cash surrender value, represents the entire value of the policies.

We submit that taxpayer's arguments to the contrary are based on a misconception of the nature of the federal estate tax, which taxpayer views as falling upon property received by the executor—i. e., as an inheritance tax. In fact, the estate tax falls upon the right to transmit which inheres in the decedent; and it is measured by the extent of the decedent's interest at death. None of the components of value in insurance policies held by a decedent on the life of another are extinguished by the mere fact of decedent's death. The decedent's interest must be valued accordingly.

Taxpayer's invocation of Treasury Regulations and decided cases is also without merit. Until 1952 the pertinent Regulations did not contain any provision for valuing policies such as here involved, contrary to taxpayer's assertion; and the amendments in 1952 are wholly in line with the Tax Court's decision herein. As for the two cases cited by taxpayer, one is a state court case interpreting state law, and the other is an early Board of Tax Appeals decision which is

irrelevant to the problem here presented. The other arguments advanced by taxpayer are unsound.

As for the second question concerning decedent's military or nonmilitary status at the time of his death, the Tax Court ruled that decedent was not a member of the military forces on active service, within the meaning of Section 939 of the 1939 Code, and hence not entitled to the exemption from tax provided by that statute. We submit that this ruling also is sound. Taxpayer was appointed as a civilian assistant to General Arnold; he drew civilian pay, traveled under civilian orders, and in all other respects occupied the status of a civilian employee of the Government. Civilian employees are not members of the military forces on active duty, within the usual and ordinary meaning of that language. This proposition is confirmed by the decided cases. Absent express authority to the contrary, then, decedent could not qualify under Section 939. There is no such express authority; indeed there are no decided cases under the statute in question. Moreover, such light as is shed on this question by legislative history, Treasury Regulations, and decided cases, serves to confirm the correctness of the Tax Court's ruling.

The cases cited by taxpayer for the contrary view—that the courts have often held a civilian to be a member of the military forces, for the purposes of various statutes—do not bear out taxpayer's contention. Where the courts have held a litigant to be a member of the military forces, they have not regarded him as a civilian, and vice versa. In the case at bar, decedent's legal status at the time of his death was

unequivocally civilian. Hence, since the language of the statute must be given its usual and ordinary meaning, he cannot qualify for the exemption from tax which the statute provides.

ARGUMENT

I

Decedent's interest in the policies on the life of his father should, for the purpose of inclusion in his gross estate under Section 811 (a) of the 1939 Code, be valued at replacement cost or, in the absence thereof, interpolated terminal reserve value

As detailed in the statement, *supra,* decedent owned at the time of his death five single-premium insurance policies on the life of his father, who survived him, together with an undivided one-fifth interest in a trust containing seventeen policies on the same life. The parties are agreed, as the Tax Court notes (R. 11a) and taxpayer acknowledges (Br. 8), that the described policies are includible in decedent's gross estate "To the extent of the interest therein of the decedent at the time of his death," under Section 811 (a) of the Internal Revenue Code of 1939 (Appendix A, *infra*). But the proper method for valuing the policies and hence decedent's interest therein, is in dispute. The Tax Court ruled (R. 12 a), in agreement with the Commissioner, that the replacement cost of the policies (or in absence thereof, the interpolated terminal reserve value) is the proper value for the purposes of Section 811 (a). Taxpayer now challenges this ruling, renewing on appeal his contention below that the cash surrender value of the

policies should be used. We submit, for the reasons given below, that the Tax Court correctly disposed of the valuation question.

At the outset it may be noted, as stated in 1 Paul, Federal Estate and Gift Taxation, Section 10.01, that—

> Life insurance is a complex bundle of mathematics and legalism * * *. Words of art abound, and a wealth of specially directed language embodying years of judicial definition must be taken into account.

Hence it appears desirable, before proceeding further, to define exactly what is meant by the words of art, peculiar to insurance law, which are pertinent to the valuation question presented by this appeal.

The basic concept, and point of departure for the other concepts involved, is that of the policy reserve. "That portion of the premiums of a policy with the interest thereon which is required to be reserved or set aside as a fund for the payment of a policy when it becomes due is called the 'reserve'." 1 Richards on Law of Insurance (5th ed.), Section 24. Put another way, the policy reserves of an insurance company are so calculated that, together with future premiums and interest earnings, they will enable the company to pay all future claims.

As for the terminal reserve on a policy, that is the reserve computed as of the end of the policy year; and interpolated terminal reserve is the reserve value as of a given date between policy anniversaries. Wightman, Life Insurance Accounts (1st ed.), pp. 105, *et seq.*

The cash surrender value of a policy is the reserve less a surrender charge. *Guggenheim* v. *Rasquin*, 312 U. S. 254, 256. As stated in 1 Richards on Law of Insurance (5th ed.), Section 24: "To discourage surrender of policies, however, the cash value is set at a considerably lower figure than the reserve value." On the other hand, replacement cost, as the term indicates, is in effect a new sale of insurance; and hence, in addition to reserve, will include a loading charge geared to the expenses of the insurance company.

So in the case at bar, the total interpolated reserve value of the policies involved exceeded the cash surrender value; whereas the replacement cost (where present) exceeded interpolated reserve value.[3] (R. 5a; Joint Exs. A–1 and B–2.) With these facts and the underlying insurance concepts in mind, we turn to authorities which, we believe, fully support the Tax Court's ruling on the valuation question.

In *Guggenheim* v. *Rasquin*, 312 U. S. 254, the Supreme Court rejected cash surrender value as the proper value of a single-premium policy for gift tax purposes, and held—there being no appreciable lapse of time between the issuance of the policy and the

[3] As computed for the purposes of this litigation, cash surrender values *in excess* of interpolated reserve values are given to five of the trust policies. (R. 5a; Joint Ex. B–2.) Just how this result was arrived at, in keeping with the principle that cash surrender value is reserve *less* a surrender charge, does not appear from the record. Perhaps the cash surrender value figures reflected accumulated dividends, whereas the reserve figures did not. Whatever the explanation, we submit that the established relationship of cash surrender value to reserve value, as stated without qualification by the Supreme Court in *Guggenheim* v. *Rasquin*, *supra*, is the important concept here.

date of the gift—that the actual cost of the policy was the best measure of value. On the same day, in *United States* v. *Ryerson*, 312 U. S. 260, where there was a lapse of some years between the purchase of single-premium policies and their gratuitous assignment, the Court held that the best available criterion of the value of the policies for gift tax purposes was replacement cost. Subsequently, in *Houston* v. *Commissioner*, 124 F. 2d 518, this Court held, under the authority of the above-cited decisions, that replacement cost was the proper measure of value for gift tax purposes as to 20-payment life insurance policies which were fully paid up. The same result has been reached as to policies which are not fully paid up. *Estate of Lockhart* v. *Commissioner*, 46 B. T. A. 426; *Phipps* v. *Commissioner*, 43 B. T. A. 790. And where no comparable policies are procurable, it is proper to use the interpolated terminable reserve value in lieu of replacement cost. *Commissioner* v. *Edwards*, 135 F. 2d 574 (C. A. 7th). Treasury Regulations relating to the gift tax conform in substance to the results of these decisions. Section 86.19 (i), Treasury Regulations 108, promulgated under the Internal Revenue Code of 1939 (Appendix A, *infra*).

While the above decisions relate to the gift tax, we believe that their underlying rationale is fully applicable, for estate tax purposes, to insurance policies owned by a decedent, on the life of someone other than the decedent. This rationale is set forth in *Guggenheim* v. *Rasquin*, *supra*, in the following language (pp. 256–257):

Cash-surrender value is the reserve less a surrender charge. And in case of a single-premium policy the reserve is the face amount of the contract discounted at a specified rate of interest on the basis of the insured's expected life. If the policy is surrendered, the company will pay the cash-surrender value. It is asserted that the market for insurance contracts is usually the issuing companies or the banks who will lend money on them; that banks will not loan more than the cash-surrender value; and that if policies had an actual realizable value in excess of their cash-surrender value, there would arise a business of purchasing such policies from those who otherwise would surrender them. From these facts it is urged that cash-surrender value represents the amount which would be actually obtained for the policies in a willing buyer-willing seller market—the test suggested by Treasury Regulations 79, Art. 19 (1), promulgated October 30, 1933.

That analysis, however, overlooks the nature of the property interest which is being valued. Surrender of a policy represents only one of the rights of the insured or beneficiary. Plainly that right is one of the substantial legal incidents of ownership. * * * But the owner of a fully paid life insurance policy has more than the mere right to surrender it; he has the right to retain it for its investment virtues and to receive the face amount of the policy upon the insured's death. * * * All of the economic benefits of a policy must be taken into consideration in determining its value for gift-tax purposes. To single out one and to disregard

> the others is in effect to substitute a different property interest for the one which was the subject of the gift.

We submit that this rationale is fully applicable to the valuation question presented by this appeal. Indeed, in *Mearkle's Estate* v. *Commissioner*, 129 F. 2d 386, this Court held that the rationale of *Guggenheim* v. *Rasquin, supra,* was equally applicable to the valuation problem posed by the estate tax and upheld the application of the Treasury Regulations making replacement cost the measure of value rather than other standards.

The gift tax is supplementary to the estate tax; the two are *in pari materia* and must be construed together; and the meaning of the phrase, "an adequate and full consideration in money or money's worth," must be given a uniform interpretation for the purpose of both taxes. *Harris* v. *Commissioner*, 340 U. S. 106; *Merrill* v. *Fahs*, 324 U. S. 308; *Commissioner* v. *Wemyss*, 324 U. S. 303; *Estate of Sanford* v. *Commissioner*, 308 U. S. 39, rehearing denied, 308 U. S. 637. So also, we believe, uniform standards of valuation should apply under the gift tax and the estate tax, absent express authority to the contrary.

Here there is no express authority to the contrary. Rather, there is every reason in the nature of the estate tax why the same standards of valuation as to life insurance should apply, where the insured is someone other than the decedent, as under the gift tax. The soundness of these propositions is best demonstrated by pointing out the fallacies in taxpayer's arguments addressed to the valuation question.

Taxpayer contends (Br. 16) that estate tax is based "on what is received in gross estate from the decedent by reason of his death," and "valuation is determined as if all the properties went to the executor." Taxpayer further contends (Br. 16–17) that an executor is duty-bound to cash in life insurance policies held by decedent on the life of another, because of the small rate of interest earned; and hence that the cash surrender value of such policies is the only proper value for estate tax purposes.

These contentions, which are unsupported by any citation of authority whatever, are unsound in premise, logic, and result. In the first place, taxpayer misconceives the nature of the estate tax. It is not true that the estate tax falls upon the property received by the executor. It is not a tax upon property; nor is it yet a tax upon the receipt of property. In 1 Paul, Federal Estate and Gift Taxation, Section 1.05, it is stated that—

> While several attempts have been made to enact a federal *inheritance* tax, the federal tax imposed since 1916 has been an *estate* tax. * * *
>
> The distinction between an estate tax and an inheritance tax is made in the regulations, which state that the estate tax is "not laid upon the property but upon the transfer of the entire net estate and not any particular legacy, devise, or distributive share. * * *" Putting the matter briefly, the federal estate tax is upon the right to *transmit*, whereas an inheritance tax is upon the right to *receive*.

To which may be added the fact that Section 811 (a) focuses upon "the interest * * * of the decedent at

the time of his death." It is upon the right to transmit this interest of the decedent that the tax falls; not upon the receipt of property by the executor. *Knowlton* v. *Moore,* 178 U. S. 41, 49.

In the case at bar, decedent's interest consisted of ownership and undivided part ownership of insurance policies on the life of his father, who survived him. As the Supreme Court said in *Guggenheimer* v. *Rasquin, supra,* life insurance policies consist of a bundle of rights and economic interests, of which the right to surrender the policies is only one. As to decedent herein, none of these rights or interests vanished merely by reason of his death, as a life estate held by the decedent would vanish. Not only the cash surrender value but all other values inherent in life insurance, including the right to dividends, remained intact. The taxpayer's views as to what the executor might or should do with the policies are surely not material. The estate tax applies to the extent of decedent's interest at time of his death. Here, decedent's interest extended not only to cash surrender value in the policies in question, but to all the other values inherent in the policies. Accordingly, under the rationale of *Guggenheim* v. *Rasquin, supra,* and the other gift tax decisions, extended by this Court in *Mearkle's Estate, supra,* to estate tax situations, the standard of value should be the replacement cost or, in absence thereof, the interpolated terminal reserve value.

Moreover, we challenge taxpayer's contention—again unsupported by any citation of authority—that an executor is duty-bound to cash in policies held by

the decedent on the life of another, because the rat of return is too small to justify retention of th policies as estate investments. The relation of a executor to beneficiaries and creditors is fiduciary i nature; and the first obligation of a fiduciary in th management of investments is to be certain that prin cipal is safely invested. High income is secondary 3 Bogert, Trust and Trustees, Sections 12, 612. In surance policies issued by the great insurance com panies are eminently safe investments, and we know of no requirement, statutory or otherwise, that an executor cash in such policies.[4]

Equally unsound is taxpayer's argument that the Treasury Regulations in force at decedent's death pertinent to the estate tax, provided a definite metho for valuing insurance policies such as those here involved. (Br. 12, *et seq.*) The provision which taxpayer invokes, Section 81.10 (i), Treasury Regu lations 105, promulgated under the Internal Revenue Code of 1939 (Appendix A, *infra*), provided expressly for valuation of "Annuities, life, remainder, and re versionary interests." Even here, it should be em phasized, Section 81.10 (i) (2) provided that the value of an annuity contract issued by a company

[4] We may observe, with respect to these contentions of the executor, as this Court did with respect to the comparable con siderations argued by the taxpayer in *Mearkle's Estate*, *supra* (p. 388), "But all these matters lie in the field of speculation, or at best, discussion." Furthermore, while taxpayer (decedent's executor) contends that it was duty-bound to cash in the policies involved, it may be noted in passing that there is no indication whatever, either in taxpayer's brief or in the record, that the policies have actually been surrendered, although thirteen years have now passed since the decedent's death in 1943.

regularly engaged in the business of issuing such contracts, is established by sales by the company of comparable contracts, thus precluding the use of the tables in the Regulations which the taxpayer here would use. It was this provision of the Regulations (Treasury Regulations 80 (1937 ed.), Article 10 (i) (2)) which this Court upheld and applied in *Mearkle's Estate, supra.* Moreover, apart from annuities (not issued by companies in that business) and life estates, this provision related only to future interests, separated from the present by intervening estates. Clearly, insurance policies held by a decedent on the life of another do not come within the terms of this provision. They are not annuities or life estates; nor are they future interests dependent upon intervening estates.

To escape this result, taxpayer argues that, despite the heading, "Annuities, life, remainder, and reversionary interests", Section 81.10 (i) in its old form extended to entirely different kinds of interests—that is, any and all types of future payments, including future payment of insurance proceeds. Taxpayer bases this argument solely on the fact that in one place the section speaks of "All other future payments." (Br. 12, *et seq.*) We submit that this argument is unsound. It is refuted by the rule of *ejusdem generis;* for under that rule of construction, where an enumeration of specific things is followed by more general words or phrases, such words or phrases are to be construed as referring to things of the same kind. 3 Words and Phrases, p. 2328. Furthermore, Section 81.10 (h) (Appendix A, *infra*) stated that

"Any property not *specifically treated* in this section should be valued in accordance with the rule laid down in subsection (a) hereof." (Emphasis added.)[5] Thus Section 81.10 (i) in its old form applied only to future interests of the same kind as those specifically enumerated, remainder and reversionary interests; and future payments of life insurance proceeds are not, of course, future interests of that kind. Moreover, it is clear that the Treasury Department never intended that the phrase, "All other future payments", have the broad meaning which taxpayer would give it. This appears from the fact that in 1952 Section 81.10 (i) was amended by the addition of a provision for the valuation of "an insurance policy on the life of a person other than the decedent." T. D. 5906, 1952–1 Cum. Bull. 155, par. 1 (Appendix A, *infra*). This confirms the fact that the general language as to "future payments" was not designed to apply to insurance held by a decedent on the life of another.

Moreover, taxpayer contradicts its own basic position in contending that Section 81.10 (i) in its old form applied to the valuation of the insurance policies in question. Taxpayer's position on this appeal, as in the Tax Court, is that the policies should be included in decedent's gross estate at cash surrender value. But application of Section 81.10 (i) in its old form results in a figure *less* than cash surrender value, as the Tax Court noted (R. 6a) and as taxpayer

[5] Subsection (a) stated, among other things, that "All relevant facts and elements of value as of the applicable valuation date should be considered in every case."

agrees (Br. 13). In short, while taxpayer invokes Section 81.10 (i) in its old form, it is really contending for a different method of valuing the policies. In view of this fact, there is hardly a justiciable controversy as to the applicability of Section 81.10 (i).

A final word may be said about the pertinent Treasury Regulations, however. As demonstrated above, Section 81.10 (i), in its form prior to amendment in 1952, did not apply to the valuation of insurance policies held by a decedent on the life of another. Taxpayer does not contend that there was any other provision of the Regulations which did apply; and in fact there was none. Hence, the Regulations being silent on the point, the Commissioner was free to apply an appropriate standard of valuation. We have shown above that the appropriate standard, under relevant authorities, is replacement cost or, in absence thereof, interpolated terminal reserve value. The criterion of replacement cost was specifically added to section 81.10 (i) by amendment in 1952, by T. D. 5906, *supra;* and this amendment was made retroactive by Section 81.10 (j), also added by T. D. 5906, *supra* (Appendix A, *infra*). In view of the inapplicability of Section 81.10 (i) in its form prior to amendment, taxpayer's objections to the retroactive force of the amendments (Br. 11–12) must fail. Moreover, the fact is surely immaterial that the amended Regulations provide only the standard of replacement cost, without providing in the alternative for the use of interpolated reserve value where a policy is irreplaceable. As shown at the outset of this argument reserve value is lower than replace-

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ment cost, which is reserve plus a loading charge. Thus, where a policy is irreplaceable, the use of reserve value in lieu of replacement cost is hardly prejudicial to the taxpayer. It must be remembered that the proper object is to value *all* of the rights and economic interests inhering in a life insurance policy—not just the one element of cash surrender value. Reserve value comes closest to this objective when replacement cost may not be determined.

There having been no precise provision of the Regulations in force at the decedent's death which compelled a contrary result, this case is just like *Mearkle's Estate, supra.* There, as here, the precise requirement that replacement cost be used as the measure of value was not specifically stated in the Regulations in force at the decedent's death. In applying the provisions of the subsequent Regulations, this Court stated that (p. 389) "there is obviously no problem of retroactive application."

Accordingly, we can do no better than to quote the following from *Mearkle's Estate* (pp. 388–389), language which is equally applicable here:

> There is no evidence in the record to show that the method of valuation adopted in the Regulations produces arbitrary results. It may well be that there are several methods of valuation which could be resorted to here, and that more than one of those methods would be reasonable. One is set out in the Regulations. They were compiled in accordance with the statute, and the general power to promulgate them, under statutory authority, is too well

established to be seriously questioned. Quite obviously a Regulation prescribing a method for valuation is not to be stricken down by the taxpayer's preference for a different method. Valuation of life insurance policies when their transfer is subject to gift tax based upon cost at the time of the taxable event has been upheld in the cases already cited. While undoubtedly there are differences presented in the situation where the taxable event is the death of the first of two annuitants, we have not been shown facts which make the same method of valuation so arbitrary as to be contrary to law.

So much for the Treasury Regulations. As for decided cases, there are none directly in point, so far as we have been able to discover. Taxpayer claims that (Br. 9) "until the instant case arose the estate tax rule generally adopted was that a life insurance policy on the life of another person was included in decedent's gross estate at its cash surrender value." This claim is baseless. We know of no decided case or administrative ruling to that effect. Taxpayer cites two cases, neither of which is apposite: an early decision of the Board of Tax Appeals, and a decision by a New York court, interpreting New York law. The former decision, *Estate of Carroll* v. *Commissioner*, 29 B. T. A. 11, is based upon ownership under local law of the source of the premiums. In that case, a husband took out insurance policies on his own life, proceeds payable to his estate. He resided with his wife in Louisiana, a community property state. He predeceased his wife. The Tax Court held that,

under the law of Louisiana, the cash surrender value of the policies fell into the estate of the marital community on the dissolution thereof by the death of the husband; and thence one-half of such value should be included in his estate. This holding, as the opinion reveals, is based upon the view that the policies were community property under state law, and that the premiums were paid by the community. There was no discussion whatever of the valuation problem, or disagreement among the parties on that point, so far as the case report reveals. The other case taxpayer cites, *Matter of Sicher,* 183 Misc. 890, 50 N. Y. S. 2d 2, is an application of New York law by the Surrogate's Court of New York County, and hence is irrelevant. But one interesting aspect of the case may be noted. The New York law involved was an *inheritance* tax law; and the valuation thereunder of insurance policies was at cash surrender value. This points up the fact discussed above, that taxpayer has mistaken the nature of the federal *estate* tax, and the pertinent distinctions between such a tax and *inheritance* taxes, which fall upon the receipt of property.

Finally, there are the textwriters cited by taxpayer. Here we draw the Court's attention to an inaccuracy on taxpayer's part which, while doubtless inadvertent, is misleading. Taxpayer purports to quote from 2 Rabkin & Johnson, Federal Income, Gift and Estate Taxation, Section 61.06 (8), the following language (Br. 10):

> One point should be noted where the policy is owned by a person other than the insured. Upon the owner's death prior to the death of

> the insured, the *cash* value of the policy is taxable in the owner's estate. (Emphasis added.)

Taxpayer has inserted the word "cash". In fact, the quoted passage states only that the "value" of a policy is taxable in the owner's estate; and the passage continues by citing the Tax Court's decision in the case at bar for the proposition that it is *not* the cash value, but the replacement cost of policies held by a decedent on the life of another, which must be included in the decedent's estate.[6]

As for the other textwriters invoked by taxpayer (Br. 10), we have been unable to procure the pamphlet from the Practicing Law Institute from which taxpayer quotes; but we have examined the cited article (Young, Insurance, Taxes and Estate Planning, 29 Taxes, Tax Magazine 980, 984 (1951), and we note that the author makes the quoted statement without any discussion or citation of authority whatsoever.

In sum, then, there are no decided cases contrary to the Tax Court's decision in this case, no administrative rulings, and no impediment in the form of conflicting Treasury Regulations. On the other hand, the rationale of the Supreme Court and other federal courts in the gift tax decisions cited and discussed above is fully applicable, in all reason and fairness, and in consonance with the nature of the federal estate tax.

In 2 Paul, Federal Estate and Gift Taxation, Section 18.03, it is said with ample citations of authority:

[6] There is also a citation without discussion of *Estate of Carroll* v. *Commissioner*, *supra;* but, as we have seen, that decision is irrelevant.

> Value is essentially and peculiarly a difficult question of fact, with the burden of proof upon the taxpayer.[3] * * * It is unsafe to neglect any apparent factor. And it is the composite of all the factors involved in a single case that should lead to a conclusion rather than an impractical attempt to assign to any particular factor a precise weight or to define its relative emphasis or importance in a total equation of valuation.

We submit that the Tax Court, in the case at bar, has dealt with the valuation question realistically, viewing all of the factors together, and giving no one factor—such as cash surrender value—an artificial isolation or importance. We believe that its conclusion is supported by substantial evidence, and should be affirmed by this Court.

II

Decedent's estate is not exempted from additional estate tax by Section 939 of the 1939 Code, because decedent was not a member of the military forces of the United States within the meaning of the statute

Section 939 (a) of the Internal Revenue Code of 1939 (Appendix A, *infra*) provides in pertinent part that—

> The tax imposed by section 935 shall not apply to the transfer of the net estate of a citizen or resident of the United States dying * * * while in active service as a member of the military or naval forces of the United States * * *.

The Tax Court ruled, in agreement with the Commissioner, that decedent was not "in active service as a member of the military * * * forces of the United

[3] * * * The appellate court will not review a finding as to value if there is substantial evidence to support it; * * *

States" at the time of his death within the meaning of Section 939 (a); and hence that his estate is not exempted by the statute from the additional estate tax imposed by Section 935. (R. 13a–17a.) We submit that this ruling is correct and should be affirmed.

Decedent did not at any time become a commissioned officer, a warrant officer, or a member of the enlisted personnel in the military service. (R. 8a.) His appointment as special assistant to General Arnold expressly designated him "to serve in a civilian capacity." (R. 7a.) Prior to his appointment, he completed and filed Civil Service Commission Form No. 57, which the Tax Court found to be within its judicial notice as the standard application form for employment of civilians by the Government. (R. 8a, 13a–14a.) He signed the oath of office of a civilian employee of the Government; and his travel applications and orders were issued from the civilian personnel division of the Office of Chief of Air Staff. (R. 8a–9a.)

In sum, decedent was a civilian employee of the Government. We believe that this fact is controlling. Section 939 applies in plain terms only to *members* of the military forces in active service. If that language is to be given its ordinary and usual meaning, it surely does not apply to decedent; for civilian employees of the Government are not, in the ordinary and usual sense, members of the military forces on active duty. As the court said in *Welts* v. *Conn. Mutual Life Ins. Co.*, 48 N. Y. 34, 39, 8 Am. Rep. 518: "The general understanding of the term [military service] includes such persons only as are liable to do duty in the field

as combatants." Absent express authority to the contrary, then, a civilian cannot qualify as a member of the military forces on active duty, within the meaning of Section 939. There is no such express authority; indeed, there are no decided cases at all under Section 939, so far as we have been able to discover, other than the decision of the Tax Court in the case at bar. And such light as is shed on the question by legislative history, Treasury Regulations, and decided cases, confirms the soundness of the Tax Court's ruling.

First, as to legislative history, we agree with taxpayer's view (Br. 23) that it is inconclusive. But the specific use of the term, "soldier", in the statement of the Chairman of the Senate Finance Committee quoted by the Tax Court in its opinion (R. 16a), indicates that Congress was thinking about members of the military forces on active service in the usual and ordinary sense that those words convey. And there is certainly nothing in the legislative history of the statute to the contrary.

The relevant provisions of Treasury Regulations are found in Section 81.2 (b) of Treasury Regulations 105, promulgated under the Internal Revenue Code of 1939 (Appendix A, *infra*). These provisions, too, offer some support for the Tax Court's interpretation of the statute. They provide in part that—

> the exemption is not allowed to the estate of a decedent whose only military status was of a limited character, such as that of a member of the Army Specialist Corps or of certain temporary members of the Coast Guard Reserve.

A fortiori, **we submit, the exemption does not extend to the estate of a civilian employee of the Government.**

This brings us to the decided cases. While there are none under Section 939, taxpayer appeals to a number of decisions under other statutes for support by analogy, and also invokes the decision in *Wilmington Trust Co.* v. *Mutual Life Ins. Co.*, 76 F. Supp. 560 (Del.), affirmed, 177 F. 2d 404 (C. A. 3d), certiorari denied, 339 U. S. 931, which dealt with the affairs of decedent in another connection.

Taxpayer contends (Br. 20) that in the *Wilmington Trust Co.* case, the District Court "determined as a fact" that (quoting from the District Court's opinion, p. 564) "I think that he [decedent] more nearly approximates one who is concededly in the military service." Not only is this observation irrelevant to Section 939—which must surely be applied in terms of actual status, not approximate status—but it follows recognition by the District Court that the weight of authority would lead to a contrary view. Said the court (pp. 563–564):

> But the cases which have been decided in the past are to the effect that one is not in the military service until he has passed the necessary examinations, enrolled as a soldier or has been commissioned as an officer and become subject to military discipline and orders. *Welts* v. *Connecticut Mutual Life Ins. Co.*, 48 N. Y. 34, 8 Am. Rep. 518; *New York Life Ins. Co.* v. *Hendren*, 24 Grat., Va., 536; *Redd* v. *American-Central Life Ins. Co.*, 200 Mo. App. 383, 207 S. W. 74; *Ruddock* v. *Detroit Life Ins. Co.*, 209 Mich. 638, 177 N. W. 242; *Jorgensen*

v. *Metropolitan Life Ins Co.*, 44 A. 2d 907, 24 N. J. Misc. 22; *Bending* v. *Metropolitan Life Ins. Co.*, 74 Ohio App. 182, 58 N. E. 2d 71.

Thus, in reality, taxpayer has invoked a decision which contains a massive citation of authorities supporting the Tax Court's view. Moreover, the District Court's observations on this point were *dicta;* the dispositive holding was that the aviation rider attached to an insurance policy on decedent's life expressly excluded death caused by flying in other than regularly scheduled commercial planes.

As for most of the cases decided under other statutes than Section 939, cited and discussed by taxpayer, we believe that there is little point in dealing with them at length, in view of obvious statutory and factual dissimilarities. However, as to a recent Supreme Court decision relied upon by taxpayer (Br. 25–27), we believe that its rationale provides substantial support for the Tax Court's ruling. In *Commissioner* v. *Connelly,* 338 U. S. 258, the taxpayer was viewed by the Supreme Court as having two co-existing legal statuses: one as a member of the armed forces, the other as a civilian employee. The statute involved provided for the exclusion from gross income of $1,500 in compensation received for active service by a commissioned officer. The Supreme Court held that this statute only applies where an officer receives compensation *qua* officer; and that the taxpayer had received his compensation *qua* civilian employee, and therefore was not entitled to the exclusion. The Court said (p. 260): "All considerations of an economic character pertaining to his employment by the

Government were related to his civil service status." And again (p. 262)—

> the taxpayer was to be paid as a civil service employee and not as a commissioned officer. His pay came from congressional appropriations allocated to civilian positions. His pay was at the civil service scale for his grade, * * *. Indeed, the taxpayer's certificate of disenrollment described the duty performed as "Chief of Admiralty and Maritime Section having civil service status, receiving civilian but no military pay, and holding rank of Commander as a Temporary Member of the Coast Guard Reserve."

In the case at bar, decedent had only one legal status: that of a civilian employee of the Government. All of the indicia of civilian status stressed by the Supreme Court in *Connelly* are applicable to decedent. Decedent did not have even the limited military status, legally, that the taxpayer had in the *Connelly* case. We submit, therefore, that the *Connelly* decision does not favor the taxpayer's position in the case at bar. Taxpayer's attempt to show otherwise is, we submit, specious and without merit.

As for taxpayer's assertion (Br. 29) that the courts have "frequently" held civilians to be in the military forces, under various statutes, we submit that this is not borne out by the cases cited. In *Greene* v. *France*, 75 F. Supp. 433 (E. D. Wis.), the court held that a mechanical engineer was subject to military law, even though a civilian, because he was a retainer or person "accompanying or serving with the Armies of the United States", within the meaning of Article 2 (d)

of the Articles of War (10 U. S. C. A., Sec. 147 (d)). In *United States* v. *La Tourrette*, 151 U. S 572, the Supreme Court reviewed various statutes pro viding for the appointment, pay, residence, and work ing conditions of army chaplains, and concluded tha chaplains hold (p. 576) "the office and rank of chap lain in the Army, and consequently in the military service * * *." In *Petition of Agustin*, 62 F. Supp 832 (N. D. Cal.), the court viewed a Philippine guer rilla leader as serving in the military forces of the United States, in view of the fact that he had been sworn in by a regular United States Army officer, had been integrated together with his men into the United States Army Forces Far East, and as a Colonel of the American Army had led an attack under heavy enemy fire which resulted in his decoration with the Distinguished Service Cross. To assert that in either the *La Tourrette* or the *Agustin* case a civilian was regarded as a member of the military forces is to indulge in a false play upon words. Both litigants were regarded as members of the military forces—and precisely by reason of that fact were *not* regarded as civilians.

As for the testimony of General Arnold (R. 7a), it is an explanation of *why* decedent was employed as a civilian. That explanation leaves unaltered the fact that decedent *was* employed as a civilian. As such, we submit, for all of the reasons given above, decedent could not qualify as a member of the military forces on active duty, within the meaning of Section 939.

Taxpayer argues that Section 939 is a remedial statute, to be liberally construed. (Br. 21–23.) The Tax Court held that the statute was one of exemption from tax, and hence to be strictly construed. (R. 15a.) We believe that the Tax Court's position is correct. But we do not think that the question turns upon liberal construction *versus* strict construction. Since there are no authorities to the contrary, the language of Section 939 must be given its usual, ordinary, plain meaning. As we have demonstrated, civilian employees of the Government are not, in the usual and ordinary sense, members of the military forces on active duty.

CONCLUSION

For all of the above reasons, we submit that the decision of the Tax Court herein is correct and should be affirmed.

Respectfully submitted.

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APPENDIX A

Internal Revenue Code of 1939:

SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

(a) *Decedent's Interest.*—To the extent of the interest therein of the decedent at the time of his death;

* * * * *

(j) *Optional Valuation.*—If the executor so elects upon his return (if filed within the time prescribed by law or prescribed by the Commissioner in pursuance of law), the value of the gross estate shall be determined by valuing all the property included therein on the date of the decedent's death as of the date one year after the decedent's death, except that (1) property included in the gross estate on the date of death and, within one year after the decedent's death, distributed by the executor (or, in the case of property included in the gross estate under subsection (e), (d), or (f) of this section, distributed by the trustee under the instrument of transfer), or sold, exchanged, or otherwise disposed of, shall be included at its value as of the time of such distribution, sale, exchange, or other disposition, whichever first occurs, instead of its value as of the date one year after the decedent's death, and (2) any interest or estate which is affected by mere lapse of time shall be included at its value as of the time of death (instead of the later date)

with adjustment for any difference in its value as of the later date not due to mere lapse of time. No deduction under this subchapter of any item shall be allowed if allowance for such item is in effect given by the valuation under this subsection. Wherever in any other subsection or section of this chapter, reference is made to the value of property at the time of the decedent's death, such reference shall be deemed to refer to the value of such property used in determining the value of the gross estate. In case of an election made by the executor under this subsection, then for the purposes of the deduction under section 812 (d) or section 861 (a) (3), any bequest, legacy, devise, or transfer enumerated therein shall be valued as of the date of decedent's death with adjustment for any difference in value (not due to mere lapse of time or the occurrence or non-occurrence of a contingency) of the property as of the date one year after the decedent's death (substituting the date of sale or exchange in the case of property sold or exchanged during such one-year period).

* * * * *

(26 U. S. C. 1952 ed., Sec. 811.)

SEC. 939. CERTAIN MEMBERS OF ARMED FORCES.

(a) [As added by Section 10 (a), Act of October 25, 1949, c. 720, 63 Stat. 891, 896–897 (the so-called Technical Changes Act of 1949), and as amended by Section 606, Revenue Act of 1951, c. 521, 65 Stat. 452] (a) *Deaths After December 6, 1941, and Before January 1, 1947.*—The tax imposed by section 935 shall not apply to the transfer of the net estate of a citizen or resident of the United States dying on or after December 7, 1941, and before January 1, 1947, while in active service as a member of the military or naval forces of the United

States or of any of the other United Nations if such decedent—

(1) was killed in action; or

(2) died as a result of wounds or other injuries, or of disease, suffered while in line of duty by reason of a hazard to which he was subjected as an incident of military or naval service.

* * * * *

(26 U. S. C. 1952 ed., Sec. 939.)

Treasury Regulations 105, promulgated under the Internal Revenue Code of 1939:

SEC. 81.2 [As amended by T. D. 5699, 1949–1 Cum. Bull. 181, and T. D. 5834, 1951–1 Cum. Bull. 72] *Description of Tax.*—

(*a*) *In general.* * * *

* * * * *

The Federal estate tax is neither a property nor an inheritance tax. It is imposed upon the transfer of the entire net estate and not upon any particular legacy, devise, or distributive share. The transfer of property is taxable although it escheats to the State for lack of heirs.

(*b*) *Exemption from additional estate tax for certain members of the Armed Forces.*— Section 939 of the Internal Revenue Code, as added by section 10 of Public Law 378 (81st Cong.), provides that the additional estate tax does not apply to the transfer of the net estate of a citizen or resident of the United States dying after December 6, 1941, and before January 1, 1947, while in active service as a member of the military or naval forces of the United States or of any of the other United Nations if the decedent was either (1) killed in action or (2) died as a result of wounds or other injuries, or of disease suffered while in line of duty by reason of a hazard to which he was subjected as an incident of military or naval service.

If the official record of the military force of which the decedent was a member at the time of his death states that death resulted from wounds or injuries received or disease contracted while in line of duty, such fact shall, in the absence of evidence establishing the contrary, be presumed to be established for the purposes of the exemption. Moreover, wounds, injuries, or disease suffered while in line of duty will be considered to have been caused by a hazard to which the decedent was subjected as an incident of military or naval service unless the hazard which caused such wounds, injuries, or disease was clearly unrelated to such service.

A person was in active service as a member of the military or naval forces of the United States or of any of the other United Nations if he was at the time of his death actually serving in such forces, not necessarily in the field or in the theater of war. Personnel in the inactive reserves or on retirement are not in active service. Periods during which a person is absent from duty on account of sickness, wounds, leave, internment by the enemy, or other lawful cause are periods of active service.

For the purposes of this section the military and naval forces of the United States include (but are not necessarily limited to) the Army, the Navy, the Marine Corps, the Coast Guard, the Army Nurse Corps; Female, the Navy Nurse Corps, Female, the Women's Army Auxiliary Corps or the Women's Army Corps, the Women's Reserve Branch of the Naval Reserve, the Marine Corps Women's Reserve, and the Coast Guard Reserve, including the Coast Guard Women's Reserve. However, the exemption is not allowed to the estate of a decedent whose only military status was of a limited character, such as that of a member of the Army Specialist Corps or of certain temporary members of the Coast Guard Reserve. For the

purposes of this section the term "member of the military or naval forces * * * of any of the other United Nations" includes any decedent whose duties and status in the service of any of the United Nations other than the United States corresponded to those of any member of the military or naval forces of the United States as defined in this section.

* * * * *

SEC. 81.10. *Valuation of property.*—(*a*) *General.*—The value of every item of property includible in the gross estate is the fair market value thereof at the time of the decedent's death; or, if the executor elects in accordance with the provisions of section 81.11, it is the fair market value thereof at the date therein prescribed or such value adjusted as therein set forth. The fair market value is the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell. The fair market value of a particular kind of property includible in the gross estate is not to be determined by a forced sale price. Such value is to be determined by ascertaining as a basis the fair market value as of the applicable valuation date of each unit of the property. For example, in the case of shares of stock or bonds, such unit of property is a share or a bond. All relevant facts and elements of value as of the applicable valuation date should be considered in every case.

* * * * *

(*h*) *Other property.*—Any property not specifically treated in this section should be valued in accordance with the rule laid down in subsection (*a*) hereof. * * *

(*i*) *Annuities, life, remainder, and reversionary interests.*—(1) If the executor adopts the option set forth in section 81.11, any annuity, life, remainder, or reversionary inter-

est includible in the gross estate should be valued as of the date of the decedent's death in accordance with the provisions of this section and then such value should be adjusted as explained in section 81.11 for any difference in value between the date of death and the applicable subsequent date due to causes other than mere lapse of time. If the executor does not adopt the option set forth in section 81.11, the value of any such interest should be computed as hereinafter prescribed without such further adjustment for any decrease or increase in the value of the property subsequent to the date of death.

(2) The value of an annuity contract issued by a company regularly engaged in the selling of contracts of that character is established through the sale by that company of comparable contracts.

(3) All other future payments are to be discounted upon the basis of compound interest at the rate of 4 per cent a year. If the time of payment or of payments is dependent upon the continuation of, or upon the termination of a life, or of lives, the Actuaries' or Combined Experience Table of Mortality, as extended, and established actuarial principles are to be used in the computation of the present worth. For the purpose of the computation the age of a person is to be taken as the age of that person at his nearest birthday. Table A, a part of this section, gives factors applicable to a case in which only one life is involved. (See paragraphs (4) to (8), inclusive.) Table B, a part of this section, gives factors applicable to a case in which only a term-certain is involved. (See paragraphs (9) to (11), inclusive.) If the time of payment or of payments is dependent upon the continuation of, or termination of more than one life, or there is a term-certain concurrent with one or more lives, a special computation in accordance with the first two

sentences of this paragraph is necessary. A case requiring a special computation may be stated to the Commissioner who will furnish the applicable factor, provided such request is made sufficiently in advance of the due date of the return. Such request must fully disclose all relevant facts. The date of birth of each person, the duration of whose life may affect the value of the interest, should be established by affidavit.

(4) If the decedent had a remainder interest in property subject to the life estate of another, the present worth of the remainder interest at the time of death should be obtained by multiplying the value of the property at the time of death by the figure in column 3 of Table A opposite the number of years nearest to the actual age of the life tenant.

Example. The decedent was entitled to receive property worth $50,000 upon the death of his elder brother, to whom the income for life had been bequeathed. The brother at the time of the decedent's death was 31 years 5 months old. By reference to Table A, it is found that the figure in column 3, opposite 31 years, is 0.31262. The present worth of the remainder interest at the date of death is, therefore, $15,631 ($50,000 multiplied by 0.31262).

* * * * *

TABLE A.—*Table, single life, 4 percent, showing the present worth of an annuity, or a life interest, and of a reversionary interest*

1	2	3
	Annuity	*Reversion*
Age	Annuity, or present value of $1 due at the end of each year during the life of a person of specified age.	Reversion, or present value of $1 due at the end of the year of death of a person of specified age.

* * * * *

(*j*) [As added by T. D. 5906, 1952–1 Cum. Bull. 155, 158–157 [*Annuities, life estates, remainders, and reversions; estates of decedents dying before January 1, 1952.*—In the case of

decedents dying before January 1, 1952, the general principles and methods prescribed in paragraph (i) of this section (with one exception set forth in the next paragraph) are to be followed but the present worth of the interest to be valued is to be computed with the use of Table A or Table B (which appear at the end of this section) and if neither table is applicable the computation is to be made upon the basis of the Actuaries' or Combined Experience Table of Mortality, as extended, and interest at the rate of 4 percent a year, compounded annually. * * *

T. D. 5906, 1952–1 Cum. Bull. 155:

* * * * *

Paragraph 1. Section 81.10, * * *, is further amended as follows:

(A) By amending paragraph (*i*) thereof to read as follows:

(*i*) *Annuities, life estates, remainders, and reversions; estates of decedents dying after December 31, 1951.*—(1) *In general.*—The value of an annuity contract, or an insurance policy on the life of a person other than the decedent, issued by a company regularly engaged in the selling of contracts of that character is established through the sale by that company of comparable contracts. See section 86.19 (*i*) of Regulations 108, relating to the gift tax. As to insurance on the life of the decedent, see section 81.28. Except with respect to the aforementioned annuity contracts and insurance policies, the values of annuities, life estates, remainders, and reversions are to be computed by the methods hereinafter prescribed in this paragraph. The present worth of such an interest which is dependent upon the continuation of, or termination of the life of one person or upon a term-certain is to be computed with the use of Table I or Table II of this section. If the

interest to be valued is dependent upon more than one life or there is a term-certain concurrent with one or more lives, see subparagraph (5) of this paragraph. For the purpose of the computation, the age of a person is to be taken as the age of that person at his nearest birthday. If the executor adopts the option set forth in section 811 (j) see section 81.11.

(2) *Annuities.*—(i) *Payable annually at end of year.*— * * *.

* * * * *

(3) *Life estates and terms for years.*— * * *

* * * * *

(4) *Remainders or reversionary interests.*— If the decedent had a remainder or a reversionary interest in property subject to the life estate of another, the present worth of such interest should be obtained by multiplying the value of the property by the figure in column 3 of Table I opposite the number of years nearest to the actual age of the life tenant. In case the remainder or reversion is to take effect at the end of a term of years Table II should be used.

TABLE I.—*Table, single life, 3½ percent, showing the present worth of an annuity, or a life interest, and of a remainder interest*

1	2	3
Age.....	Annuity.....	Remainder.

* * * * *

Treasury Regulations 108, promulgated under the Internal Revenue Code of 1939:

SEC. 86.19 *Valuation of Property.*—(*a*) *General.*—The statute provides that if the gift is made in property, the value thereof at the date of the gift shall be considered the amount of the gift. The value of the property is the price at which such property would change hands

between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell. The value of a particular kind of property is not to be determined by a forced sale price. Such value is to be determined by ascertaining as a basis the fair market value at the time of the gift of each unit of the property. For example, in the case of shares of stock or bonds, such unit of property is a share or a bond. All relevant facts and elements of value as of the time of the gift should be considered.

* * * * *

(*i*) *Life insurance and annuity contracts.*— The value of a life insurance contract or of a contract for the payment of an annuity issued by a company regularly engaged in the selling of contracts of that character is established through the sale of the particular contract by the company, or through the sale by the company of comparable contracts. As valuation through sale of comparable contracts is not readily ascertainable when the gift is of a contract which has been in force for some time and on which further premium payments are to be made, the value may be approximated, unless because of the unusual nature of the contract such approximation is not reasonably close to the full value, by adding to the interpolated terminal reserve at the date of the gift the proportionate part of the gross premium last paid before the date of the gift which covers the period extending beyond that date.

The examples given below, so far as relating to life insurance contracts, are of gifts of such contracts on which there are no accrued dividends or outstanding indebtedness.

Example (*1*). A donor purchases from a life insurance company for the benefit of another a life insurance contract or a contract for the

payment of an annuity; the value of the gift is the cost of the contract.

* * * * *

Example (3). A donor owning a life insurance policy on which no further payments are to be made to the company (e. g., a single premium policy or paid-up policy) makes a gift of the contract. The value of the gift is the amount which the company would charge for a single premium contract of the same specified amount on the life of a person of the age of the insured.

Example (4). A gift is made four months after the last premium due date of an ordinary life insurance policy issued nine years and four months prior to the gift thereof by the insured, who was 35 years of age at date of issue. The gross annual premium is $2,811. The computation follows:

Terminal reserve at end of tenth year	$14,601.00
Terminal reserve at end of ninth year	12,965.00
Increase	1,636.00
One-third of such increase (the gift having been made four months following the last preceding premium due date), is	545.33
Terminal reserve at end of ninth year	12,965.00
Interpolated terminal reserve at date of gift	13,510.33
Two-thirds of gross premium ($2,811)	1,874.00
Value of the gift	15,384.33

(*j*) *Other property.*—Any property not specifically treated in this section should be valued in accordance with the rule laid down under (*a*) hereof.

* * * * *

APPENDIX B.—*Joint Exhibit A–1 to the Stipulation*

Column 1	Column 2	Column 3	Column 4	Column 5	Column 6
Insurance Company	Number	Face value [1]	Cash surrender value	Interpolated reserve	Replacement cost
Confederate Life Insurance Company	462, 344	$50, 000	$32, 600. 00	$33, 782. 00	$38, 900. 00
Home Life Insurance Company	425, 809	50, 000	35, 993. 00	35, 993. 00	40, 001. 50
Mutual Life Insurance Company	4, 921, 865	50, 000	42, 213. 00	42, 416. 50	(2)
Travelers Life Insurance Company	428 N W 50	100 000	65, 270. 00	67, 720. 00	80, 802. 00
New York Life Insurance Company	12, 462, 985	100, 000	70, 777. 00	84. 277. 00	(2)
		350, 000	246, 853. 00	264, 188. 50	159, 703. 50

[1] Face value consists of the face value of the policy, paid-up additional insurance purchased with dividends, and dividend accumulations.
[2] Similar policy not issue.

Joint Exhibit B–2 to the Stipulation

Column 1	Column 2	Column 3	Column 4	Column 5	Column 6
Insurance company	Policy number	Face value [1]	Cash surrender value	Interpolated reserve	Gross annual premium
Penn Mutual Life Insurance Company	846940	$88,260.00	$37,138.11	$36,791.73	$1,496.00
New England Mutual Life Insurance Company	353520	41,772.00	22,728.38	22,739.67	921.00
Equitable Life Assurance Society of United States	2346,563	136,831.00	74,725.42	74,061.47	3,191.00
Do	•3621,076	189,205.00	90,928.01	93,532.80	6,168.00
Do	3621,077	126,139.00	60,620.34	62,356.86	4,112.00
Aetna Life Insurance Company	P–573915	118,842.22	55,066.65	55,055.57	3,843.00
Do	P–573916	59,421.12	27,533.33	27,527.80	1,921.50
Prudential Insurance Company of America	2638738	56,839.00	27,844.43	27,838.58	1,248.50
State Mutual Life Assurance Company	189,890	67,864.46	36,701.15	36,726.29	1,496.00
Mutual Benefit Life Insurance Company	851,749	6,936.27	3,777.43	3,780.96	149.60
Do	851,750	131,747.96	71,741.72	71,808.89	2,842.50
John Hancock Mutual Life Insurance Company	550426	30,082.38	16,528.61	16,569.04	737.35
Mutual Life Insurance Company of New York	2518–657	141,543.00	77,500.02	77,593.98	3,191.00
New York Life Insurance Company	3 821 972	10,313.15	7,509.15	8,740.85	[2]
Do	4,067 789	15,601.73	11,354.93	13,243.28	[2]
Do	4 288 707	12,293.10	8,909.67	10,434.80	[2]
Do	10 300 717	60,722.00	27,659.80	28,110.54	2,323.00
		1,274,413.39	658,267.15	666,913.11	33,640.45

[1] Face value consists of the face value of the policy, paid-up additional insurance, and dividend accumulations.
[2] Paid up.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 319

ESTATE OF RICHARD C. DUPONT, DECEASED,
WILMINGTON TRUST COMPANY, EXECUTOR, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and opinion of the Tax Court (R. 3a–17a) are reported at 18 T. C. 1134. The opinion of the Court of Appeals is reported at 233 F. 2d 210.[1]

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[1] The record filed herein by taxpayer, pursuant to this Court's Rule 21, consists of copies of the respective appendices to the taxpayer's brief and the Government's brief in the Court of Appeals, and of proceedings of the Court of Appeals. Record references herein are to the pages of the appendix of taxpayer's brief, as printed and filed in the Court of Appeals. References to the opinion of the Court of Appeals are to the pages of the slip opinion.

JURISDICTION

The judgment of the Court of Appeals was entered on May 16, 1956. The petition for a writ of certiorari was filed on August 14, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

QUESTION PRESENTED

Whether the estate of a person killed during the war, while flying as special civilian assistant to the Commanding General of the Army Air Forces, is exempted from certain estate taxes by Section 939 of the Internal Revenue Code of 1939, which applies only to the estates of members of the military or naval forces of the United States on active service.

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code of 1939:

> SEC. 939. CERTAIN MEMBERS OF ARMED FORCES.
>
> (a) [As added by Section 10 (a), Act of October 25, 1949, c. 720, 63 Stat. 891, 896–897 (the so-called Technical Changes Act of 1949), and as amended by Section 606, Revenue Act of 1951, c. 521, 65 Stat. 452] (a) *Deaths After December 6, 1941, and Before January 1, 1947.*—The tax imposed by section 935 shall not apply to the transfer of the net estate of a citizen or resident of the United States dying on or after December 7, 1941, and before January 1, 1947, while in active service as a member of the military or naval forces of the United States or of any of the other United Nations if such decedent—
>
> (1) was killed in action; or

(2) died as a result of wounds or other injuries, or of disease, suffered while in line of duty by reason of a hazard to which he was subjected as an incident of military or naval service.

* * * * *

(26 U. S. C. 939.)

Treasury Regulations 105, promulgated under the Internal Revenue Code of 1939:

Sec. 81.2 [as amended by T. D. 5699, 1949–1 Cum. Bull. 181, and T. D. 5834, 1951–1 Cum. Bull. 72, T. D. 5941, 1952–2 Cum. Bull. 234]. Description of Tax.—

* * * * *

A person was in active service as a member of the forces described in section 939 (a) or (b) if he was at the time of his death actually serving in such forces, not necessarily in the field or in the theater of war. Personnel in the inactive reserves or on retirement are not in active service. Periods during which a person is absent from duty on account of sickness, wounds, leave, internment by the enemy, or other lawful cause are periods of active service. * * *

For the purposes of this section, the term "military or naval forces of the United States" and the term "Armed Forces of the United States" each includes all regular and reserve components of the uniformed services which are subject to the jurisdiction of the Secretary of Defense, the Secretary of the Army, the Secretary of the Navy, or the Secretary of the Air Force. The terms also include the Coast

President Roosevelt awarded the Distinguished Service Medal posthumously to the decedent for exceptionally meritorious and distinguished service, exceptional professional ability and inspiring leadership in planning and supervising the effective use of military gliders, directing their exploitation for airborne operations, effecting important changes in training techniques, and otherwise contributing materially to the successful accomplishment of a mission of the greatest importance to the war effort. (R. 10a.)

ARGUMENT

1. There is here under attack the ruling of the lower courts that the facts of the present case fail to meet the requirements of a tax exemption statute. The statute in question, Section 939 (a) of the Internal Revenue Code of 1939, *supra*, p. 2, provides in pertinent part that the additional estate tax imposed by Section 935—

> shall not apply to the transfer of the net estate of a citizen or resident of the United States dying * * * while in active service as a member of the military or naval forces of the United States * * *.

The lower courts concluded that the decedent was not, at the time of his death, "in active service as a member of the military * * * forces of the United States" within the meaning of the statute; and hence that his estate is not exempted from the additional estate tax.

Giving to the language of the statute its plain, ordinary and usual meaning—and no authority for a different construction is suggested—it is evident that the ruling of the lower courts is correct. The exemption allowed by Section 939 is expressly limited to *members* of the military or naval forces in active service. Civilian employees of the Government are not, in the ordinary and usual sense, members of the armed forces on active duty.[2]

In the case at bar, decedent was never liable to do duty in the field as a combatant; nor did he become a commissioned officer, a warrant officer, or a member of the enlisted personnel in the military service. His appointment as special assistant to General Arnold expressly designated him "to serve in a civilian capacity." (R. 7a.) He filed the standard application form for employment of civilians by the Government; took the oath of office of a civilian employee; and received his travel orders and his pay as a civilian employee, from the civilian personnel division of the

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[2] It is said in *Wilmington Trust Co.* v. *Mutual Life Ins. Co.*, 76 F. Supp. 560, 563–564 (Del.), affirmed, 177 F. 2d 404, certiorari denied, 339 U. S. 931:

"But the cases which have been decided in the past are to the effect that one is not in the military service until he has passed the necessary examinations, enrolled as a soldier or has been commissioned as an officer and become subject to military discipline and orders. *Welts* v. *Connecticut Mutual Life Ins. Co.*, 48 N. Y. 34, 8 Am. Rep. 518; *New York Life Ins. Co.* v. *Hendren*, 24 Grat., Va., 536; *Redd* v. *American-Central Life Ins. Co.*, 200 Mo. App. 383, 207 S. W. 74; *Ruddock* v. *Detroit Life Ins. Co.*, 209 Mich. 638, 177 N. W. 242; *Jorgensen* v. *Metropolitan Life Ins. Co.*, 44 A. 2d 907, 24 N. J. Misc. 22; *Bending* v. *Metropolitan Life Ins. Co.*, 74 Ohio App. 182, 58 N. E. 2d 71."

The last case invoked by taxpayer is *Soriano* v. *United States,* decided by the Court of Claims on December 16, 1955, certiorari granted, 351 U. S. 917. But here again—as in the *Connelly* and *Cohen* cases—the Court is not called upon to explore the broader meanings of "military service," or "member of the military or naval forces," but is faced with a much narrower issue; hence its issuance of the writ has no relevance to the case at bar. *Soriano* is one of a group of suits against the United States by plaintiffs who claim reimbursement for having furnished foodstuffs and other supplies to guerrilla units operating in the hills of the Philippines during the Japanese occupation. The question before this Court is whether the Philippine guerrillas were members of the armed forces of the United States, as well as of the Commonwealth of the Philippines, an issue which has no relevance here. It is undisputed in that case that the guerrillas were performing military service as combatants in uniform, subject to military discipline; and it is undisputed that they were members of regularly constituted armed forces. But such membership is precisely the matter at issue in the case at bar; and it is irrelevant to this issue whether the armed forces of which the guerrillas were members should be attributed to one sovereign power or to two.

We submit, therefore, that the decisions invoked by taxpayer are irrelevant to the issue raised herein; and that the lower courts correctly held that decedent was not a member of the military or naval forces of the United States at the time of his death. If any-

thing, the cases relied upon by taxpayer militate against its position; and the decision herein, as the Court of Appeals points out (Slip Op. 3), derives further support from *United States* v. *Popham,* 198 F. 2d 660 (C. A. 8th).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER, 1956.

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Guard. The members of such forces include commissioned officers and the personnel below the grade of commissioned officer in such forces. However, the exemption is not allowed to the estate of a decedent whose only military status was of a limited character, such as that of a member of the Army Specialist Corps or of certain temporary members of the Coast Guard Reserve. For the purposes of this section the term "member of the military or naval forces * * * of any of the other United Nations" includes any decedent whose duties and status in the service of any of the United Nations other than the United States corresponded to those of any member of the military or naval forces of the United States as defined in this section.

* * * * *

STATEMENT

The material facts, as found by the Tax Court (R. 4a–10a), may be summarized as follows:

During his lifetime, the decedent was an expert glider pilot and a manufacturer of glider aircraft. His experience and knowledge in the glider field resulted in his appointment in April, 1943, as special assistant to the Commanding General of the Army Air Forces, in charge of the Army's program for air transport of troops and cargo by gliders. The appointment was preceded by a letter from decedent to General H. H. Arnold (then commanding the Army Air Forces) suggesting that—

> In order to accomplish results in a minimum of time, authority necessary to short cut usual lines seem to indicate that I would be most effective if appointed as a Special Civilian Assistant on your staff, with no military rank * * *.

In appointing decedent as special assistant, General Arnold designated him "to serve in a civilian capacity;" gave decedent " * * * with respect to the glider program the authority of an Assistant Chief of Air Staff;" directed decedent to report to him through the Chief of Air Staff; and authorized him to deal directly with the Assistant Chief of Air Staff and with the commanding generals of the various Air Forces. A directive issued concurrently with decedent's appointment "* * * created within Headquarters, Army Air Forces, the office of Special Assistant on the Army Air Forces Glider Program." (R. 6a–7a.)

General Arnold later wrote with respect to decedent's appointment, and if living would testify, as follows (R. 7a):

> * * * That clause,—"to serve in a civilian capacity"—, was inserted, in his case, primarily to expedite the program for which he, because of his special qualifications, had been made responsible, and because of the urgent relation of that program to the effectiveness of United States Army Air Forces combat operations. In civilian clothes, Mr. du Pont was automatically relieved of the necessity of channeling his

activities through numerous subordinate military offices: as a civilian he could deal *direct* with the Office of the Commanding General, Army Air Forces. This meant an invaluable saving of time; and time, at that period, was crucially "of the essence". In this sense, then, his being in civilian clothes was truly a military expedient. Factually, he was as much a member of our military establishment as though he held a commission. He gave his life in military service as actually as any officer in uniform, in actual military combat.

As special assistant decedent's duties and functions were, *inter alia*, to determine tactics and techniques with respect to the use of gliders and related equipment; determine policies, programs and standards for training individuals and units; determine and approve military characteristics of materials used primarily in the glider program; determine policies, plans and programs for research, developmental engineering, procurement and production; and direct and coordinate the testing of gliders and related equipment. (R. 7a–8a.)

Decedent did not at any time become a commissioned officer, a warrant officer, or a member of the enlisted personnel in the military service. Prior to his official appointment, decedent completed and filed Civil Service Commission Form No. 57; and he signed the oath of office of an employee of the Federal Government. On the Notification of Personnel Action form, decedent's position was stated as that

of a "Special Consultant." His travel applications and orders were issued from the civilian personnel division of the Office of Chief of Air Staff. (R. 8a.–9a.)

Decedent worked with Major General Ridgway and airborne troops in devising training techniques and tactics for the anticipated use of gliders in combat. Under his direction and supervision the utilization of large gliders for airborne operations was rapidly attained. From July 9 through July 27, 1943, decedent was on duty in the North African Theater of Operations, and personally observed the use of gliders in combat operations in the Sicilian campaign. (R. 9a.)

On September 10, 1943, decedent went to March Field, California, on what General Arnold described as "* * * a military mission under direct orders from Headquarters Army Air Forces, Washington, D. C. * * *". On September 11, 1943, at March Field, while acting in his capacity as special assistant, the decedent participated as an observer in flights testing an experimental transport glider. While the glider, piloted by an Army colonel making a familiarization flight, was being towed in flight by an Army plane piloted by an Army captain, the glider became detached from the tow plane, stalled, and lost altitude. By order of the glider pilot, decedent bailed out. His parachute opened but did not fill, and he sustained injuries resulting in his immediate death. (R. 9a–10a.)

Office of Chief of Air Staff. (R. 8a–9a, 13a–14a.) As for the testimony of General Arnold (R. 7a), it is an explanation of *why* decedent was employed as a civilian. And the fact that decedent's duties were of a type which could have been performed by members of the armed forces is immaterial. The same is true of the duties of test pilots employed by the manufacturers of military aircraft, yet surely no one would contend that such pilots would come within the ambit of Section 939.

2. There is no conflict between the ruling here assailed and decisions of this Court, or of any other court. The decisions invoked by taxpayer, insofar as they have any application here, do not support its position.

In *Commissioner* v. *Connelly,* 338 U. S. 258, the statute involved provided for the exclusion from gross income of $1,500 in compensation received for active service by a commissioned officer. This Court held that the statute only applied where an officer received compensation *qua* officer; and that the taxpayer had received his compensation *qua* civilian employee, and therefore was not entitled to the exclusion. In the case at bar, decedent did not even have the limited military status, legally, that the taxpayer had in the *Connelly* case; he was only a civilian employee of the Government. We submit, therefore, that the *Connelly* decision—far from conflicting with the ruling of the lower courts in the instant case—militates against the broad view of military service urged by taxpayer.

In *Mitchell* v. *Cohen,* 333 U. S. 411, the question was whether members of the Volunteer Port Security Force of the Coast Guard were entitled to Civil Service preference (p. 417) as "ex-servicemen * * * who have served on active duty in any branch of the armed forces of the United States, during any war," within the meaning of the Veterans' Preference Act of 1944. This Court answered the question in the negative. In so holding, the Court recognized (p. 417) that "respondents concededly did perform military service while on intermittent active duty with the Volunteer Port Security Force"; and (p. 418) that "Ex-servicemen are indeed those who have performed military service." But it held that the term, "ex-servicemen," as used in the statute before it, did not extend to all who have performed military service, but only to full time personnel who received military pay. The *Cohen* decision does not purport to define what is meant by "military service," either in general terms or in any particular context. It recognizes that the performance of military service is a *sine qua non* for the qualifications of "ex-servicemen"; notes that this qualification is concededly met in the case before it; and goes on to hold that the Veterans' Preference Act imposes *additional* requirements upon those who would qualify thereunder as "ex-servicemen." This restrictive holding sheds no light whatever upon the meaning of the language, "in active service as a member of the military or naval forces," either in its general signification or in its statutory context in Section 939.